THE

CLEVELAND LAW RECORD,

DEVOTED PRINCIPALLY TO THE

REPORT OF LEADING CASES

IN THE SEVERAL COURTS IN OHIO AND OTHER STATES,

AND ESPECIALLY TO THOSE IN THE

District Court of Cuyahoga County, O.

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INTRODUCTION.

At first view, it may seem presumption in me to appear before the public—especially the *law-reading* public—as the Editor and Publisher of a Law Journal; but when I state the circumstances which have led me to the publication of this pamphlet and such others as may follow, I trust it will not appear that I have taken a step unwarranted by existing circumstances.

Having during the past year retired for a short time from the general practice of law, and thereby having some leisure, at the last term of the District Court in Cuyahoga county, I was requested by the proprietors of the Cleveland Herald to furnish for their paper a synopsis of the proceedings of the District Court, then in session, to which I assented. At first, I furnished brief statements of the more important questions discussed and decided. But finding that I could not do full justice to the Court, or questions discussed and decided, unless I gave a more extended statement, I concluded in all cases of importance to report the facts and points raised, with the substance of the opinion or charge of the Court, thereby making the case of more value to the public, and especially to the legal profession.

These Reports were submitted to the Judges who gave the opinions, and by them approved before they were published. It was natural, that under these circumstances, the Reports

should possess something of interest, and carry with them some weight and authority; and such was the effect.

Since the publication, it being understood that I had preserved the Reports, I have very frequently been applied to by members of the legal profession for the use of them, and very many have expressed a wish that these Reports might be published in pamphlet, so that they might be easily obtained and preserved in a permanent form, especially as many of the questions decided were novel and important. I therefore concluded to give this and one or two other Numbers to the public, and perhaps more, under the name of "THE CLEVELAND LAW RECORD."

In the publication, I shall not confine myself to the reports of cases in the District Court of Cuyahoga county, but shall procure decisions from various other Courts of Ohio, and from the U. S. Circuit and District Judges of the State of Ohio, and occasionally reports from Courts of other States, when they may contain matters of real interest to the legal profession.

Among the subjects in this Number, will be found the following:

Extent of the master's authority to bind his vessel or owners.

What is a sufficient waiver of demand of payment and notice of non-payment by an endorser of a promissory note.

Certificates of deposit and the laws governing them.

The effect of the wrecking of a vessel, upon a right to seize a portion of the machinery and furniture of the vessel, saved from the wreck, when the vessel as such no longer exists.

Practice under the code as to issuing a summons when it can not be served, and the necessity of notifying a defendant, either actually or constructively, before taking judgment, &c.

What relation must subsist between the deceased and those surviving, in order to entitle an administrator to recover under the statute of Ohio allowing compensation, when death has

been caused by the wrongful act, neglect, or default of another.

What will authorize the reversal of a decree rendered under the practice in Ohio before the code on bill of review.

By what law is a bond executed in Ohio and to be performed in New York, governed; and though negotiable in Ohio, by its laws, what effect will the laws of New York have on its negotiability, where it is not negotiable, &c.

What constitutes a valid marriage by the common law, and is such marriage valid in Ohio, &c.

What remedy will be afforded in equity, when a parent, being old, deeds to a child his farm, and is to be supported by the child during life, and the child sells the property and commits the keeping of the parent to another, without the parent's consent.

Will the vendor's lien attach when the property sold is only an equitable interest?

What state of things must exist in order to justify the District Court, on appeal, in assessing a penalty of ten per cent. instead of five per cent.?

Where a power of attorney is attached to a note to confess judgment, &c., can a judgment by virtue of such power be confessed in favor of any one except the payee of the note?

Effect of alteration of a note upon the rights of an endorser, where the alteration is by inserting a place of payment without the endorser's knowledge or consent, when none before existed in the note.

These are not all the principles decided, but they are sufficient to indicate the contents of this number.

I do not expect that this publication will be a paying one, but if it shall be found to contain matter useful and interesting to the legal profession and in the administration of justice, I shall be amply repaid for any time I may have devoted to the publication.

It would be a favorite enterprise with me, could I find the time, to permanently establish and publish a law periodical at Cleveland, or to assist others in doing the same; but whatever may be done hereafter, I do not propose to attempt it in what I now have undertaken, but to publish two or three Numbers; and if I should from time to time accumulate other legal matter, the publication of which should seem to be called for, then other Numbers may follow, though not at any stated periods.

J. P. BISHOP.

CLEVELAND, AUGUST, 1856.

DISTRICT COURT, CUYAHOGA COUNTY,

OCTOBER TERM, 1855.

Reports of Cases decided in this Court, by Judge Ranney, of the Supreme Court, and Starkweather, Foote, Fitch and Otis, Judges of the Common Pleas. The Reports were submitted to and approved by the Judges respectively who delivered the Opinions.

CRAWFORD & CHAMBERLIN *vs.* SCHOONER ERIE.

1. A master of vessel cannot by any contract of his, as such master, bind the vessel so as to make her liable to seizure under the Water Craft Law of Ohio, "providing for the collection of claims against steamboats and other water craft, and authorizing proceedings against the same by name," (*Swan's Statutes*, 185,) when the transaction is not within the line of the master's duty.

2. It is not within the duty of the master, in addition to the transportation of flour, to go ashore at the point of destination and sell the property as the factor of the owner of it.

3. Money paid for insurance, on property shipped under such contract, and money advanced to pay for supplies for such craft, are not chargeable to the vessel.

This was a claim on a due bill, signed by the master of defendant, purporting to be for flour, provision, supplies, and repairs furnished on and to defendant.

It appeared in evidence that the master applied to plaintiffs to purchase flour, but they would not trust him, but would ship some flour, and all above a certain price the master might have for carrying the flour. The flour amounted to $150, the balance was made up of insurance on the flour and a small amount of money advanced for supplies.

The flour was to be taken on defendant and sold by the master at the Saut, and he was to account to plaintiffs

at $2,50 per bbl. The flour was sold at the Saut by the master, but the money not paid over.

BOLTON, KELLY & GRISWOLD, for defendant.

1. Claimed that the due bill was not sufficient to enable plaintiffs to recover unless accompanied by proof that it was given for such consideration as would make the defendant liable under the Water Craft Law, and cited 20 *Ohio R.* 68.

2. That the contract under which the flour was taken was one which the master, as such, had no right to make, and cited *Flanders on Shipping*, 165; 8 *Greenleaf*, 356; 2 *Eng. Law and Eq.*, 337.

Messrs. PRENTISS, for plaintiff, claimed this case came within the rule established in case of the schooner Argyle, 17 *Ohio R.* 460.

The Court, by RANNEY, Supreme Judge, held —

That the flour was transported according to agreement, and disposed of according to agreement; that this case did not come within the rule laid down in case of schooner Argyle, 17 *Ohio R.* 460, or case of steamboat Owen, 2 *Ohio State R.* 142.

The first case was stretched to the utmost verge which the law allows; that case decides "that a contract by the captain to carry goods and collect the price from the consignee is binding on the vessel." The money was paid in that case to the master, but he failed to pay it over to the vessel's owners, or to the owners of the goods; and it was held that the plaintiff could hold the vessel under the Water Craft Law for the amount. In the case of the Owen, the master delivered the goods and did not

collect the purchase price of the goods. The goods were only to be delivered on condition of the charges on the goods being paid, they having been delivered without such payment, the vessel was held liable for a breach of the contract of shipment.

In the case at bar, the master of the vessel was not only to transport the flour to its destination, but was then to go on shore and sell the property, as factor of the plaintiffs. This was not within the line of duty of the master, as such, and he could not bind the vessel thereby. The insurance and money advanced are not chargeable to to the vessel.

Judgment for defendant.

C. L. SEYMOUR,
vs.
J. FRANCISCO, Adm'r, and JACOB FRANCISCO.

An endorsement on a note in these words: "Notice of presentment, demand and protest waived," is not only a waiver of a demand of payment, but of notice of non-payment to the endorser, at the maturity of the note.

Claim for money by plaintiff on three notes, each for $133 33-100, drawn by P. S. Francisco, and endorsed by Jacob Francisco. Over endorser's name was written "Notice of presentment, demand and protest waived." The notes were payable at bank. No demand of payment was made, or notice of non-payment given to the endorser at the maturity of the notes, nor were the notes at the bank when they matured.

J. C. GRANNIS, Att'y for plaintiff, claimed that demand of payment and notice of non-payment had been waived by the endorser.

That it was sufficient if the note was at the place where payable at the time of maturity, and no demand in that case is necessary, and that fact need not be averred or proved.

Some other points were also made, but not decided.

C. Stetson, Att'y for defendant, claimed that there was no waiver of demand of payment at the time of the maturity of the notes.

Ranney, Supreme Judge, delivered the opinion of the Court, holding that although a mere literal construction of the waiver by the endorser, which he had made, would not excuse the holder from making a demand, yet, taking the whole together, it could not mean any thing less than that the endorser waived both demand of payment and notice of non-payment of the notes, when they should become due; that the language used is inconsistent with the view that notice of non-payment merely was intended to be waived.

Judgment for the plaintiff.

BUFFALO MUTUAL INSURANCE COMPANY,

vs.

STEAMBOAT AMERICA.

An attachment against a steamboat, under the Water Craft Law of Ohio, will be dismissed on motion, where articles of furniture of a vessel have been seized under the attachment, if it appears in evidence that the vessel, before the seizure, was wrecked and no longer existed as a water craft.

This was a motion to dismiss attachment issued under the Ohio Water Craft Law.

Reasons urged in favor of the motion, were —

1. That the defendant had been wrecked before the attachment was served, and no longer existed as a water

craft; and the attachment had only been served on certain articles of furniture and machinery saved from the wreck.

2. The return of the sheriff did not show that the craft had been seized.

It was argued by counsel, that the steamboat, before issuing the warrant of seizure, had become a total wreck, and no longer existed as a water craft; and that the articles seized by the sheriff had been saved from the wreck, and had formerly belonged to the boat.

OTIS, Judge, delivering his opinion, held—

The only right given to the plaintiff was under the Water Craft Law; that this law gives no right to proceed against a craft by name when it no longer exists for the purposes for which it was intended; that if it had become a total wreck, then it was like a deceased individual, no longer liable to be seized or sued. Motion to dismiss granted.

For the motion, SPALDING and PARSONS — against, PRENTISS, PRENTISS, and NEWTON.

LAWRENCE HALLORAN, Administrator of John Halloran, dec'd,

vs.

CLEVELAND, PAINESVILLE & ASHTABULA RAILROAD CO.

1. Under the act of the Legislature of Ohio, allowing compensation in cases where death has been caused by the wrongful act, neglect or default of another, if there be no widow or next of kin of the deceased, having a legal interest in his life, an action cannot be maintained.

2. The petition must show there is such widow or next of kin of the deceased, as had a pecuniary interest in the life destroyed.

This action was brought by plaintiff, as administrator of John Halloran, deceased, to recover damages of the defendants, under the act allowing compensation in cases

where death has been caused by the wrongful act, neglect or default of another. The facts in the case, as established by proof, were, that John Halloran, a boy between five and six years of age, was on the railroad track of the defendants, in the month of April, 1854, and that while on said track, he was run over by the passenger train of the defendants, and so injured that he died in a few hours thereafter. The petition set forth that the next of kin to the deceased was an infant sister, which the proof showed at the time of the injury was about one year old.

The circumstances attending the injury were detailed in evidence, and thereupon the plaintiff rested his case.

The defendants then, by their counsel, moved the court for a non-suit, on the ground that the relation of brother and sister was not such in law as would legally create a pecuniary interest in the life of either, and that consequently, the death of either, was not to be any pecuniary loss to the other, nor establish any right to compensation under the statute. The motion was argued by F. T. Backus and J. Adams.

The Court, Fitch, Judge, in deciding upon the motion, held--

1. That the action, although prosecuted in the name of the administrator, must be exclusively for the benefit of the widow or next of kin, and if there be no widow or next of kin the action cannot be maintained.

2. That the petition and proof must set forth and show that there is such a widow or next of kin to deceased as is by law entitled to the compensation sought.

3. That the relation between the deceased and the person claiming compensation must be such as to create

some pecuniary interest in the life destroyed. The verdict of the jury is to compensate the widow and next of kin for the pecuniary injury resulting to them from the death; and the relation must be such as in law would create an obligation to support, or some legal interest which during the life-time of the deceased could be enforced. The simple relation of brother and sister does not, of itself, create any such obligation or interest, and in the absence of all proof upon that subject the action cannot be sustained; the jury have no damages to estimate, for there is no one appearing in the case to have sustained any pecuniary loss.

4. That the clause of the statute, prescribing the manner of distributing the compensation, must be taken in connection with the first section, giving the administrator the right of action, and that the administrator cannot recover unless such a state of facts is made to appear, by proof or operation of law, as will create such a relation in the widow, or next of kin, as to give them a legal interest in the life of the deceased, and which, by his death would result in pecuniary loss to the party.

The plaintiff having therefore failed to establish these facts must become nonsuit. Plaintiff moved to set aside the nonsuit, which, after argument, was overruled.

J. Adams and W. Abbey, for plaintiff.

Bishop, Backus & Noble, for defendant.

PRATT et al., *vs.* SHERMAN et al.

[ERROR.]

1. In case of foreign attachment under the code, it is not necessary to issue a summons, where it cannot be personally served.
2. To authorize a judgment, there must be either personal service by summons, or proof of notice of publication, before the rendition of judgment.

This was a case of foreign attachment, where an order of attachment was issued from the common pleas, against Pratt, et al., in favor of Sherman, et al., for about $200. No summons was issued, and on the 14th day of April, 1854, the Court rendered judgment in favor of Sherman, et al. vs. Pratt, et al. Oct., 1854, Sherman, et al., plaintiffs, filed in the court of common pleas, proof of notice of the pendency of the above case, the case having been previously disposed of. No action of the Court was taken on the proof of notice; it was merely filed, substantiated by affidavit that the notice had been published the required time previously to the rendition of the judgment. There was no appearance in the common pleas by defendants.

The Court per FITCH, Judge, held —

1. That it was not requisite to issue a summons in cases like the present one, when an attempt at service would be perfectly fruitless, the defendants being beyond the jurisdiction of the Court.

2. That to authorize the rendition of the judgment there must be a notice to the defendants by service of a summons, or a constructive service, by publication as required by the code; that neither of said modes of proceeding had been adopted in this case; that the notice

filed subsequently to the rendering the judgment, was of no avail, as it never had the action of the Court thereon. Judgment of the common pleas reversed.

For plaintiffs, AXTELL and PRENTISS — for defendants, R. D. NOBLE.

CUYAHOGA STEAM FURNACE COMPANY *vs.* G. F. LEWIS.

1. A certificate of deposit for $1150, to draw interest if left 30 days and payable on return of the certificate properly endorsed, is a good promissory note.

2. The charter of plaintiff, requiring the funds of the Company to be used in the manufacture of iron, &c., it could not legally become possessed of such certificate, unless in the course of its legitimate business.

3. If the plaintiff became possessed of such certificate as endorsee, under circumstances sufficient to put it on enquiry as to its character in the hands of the original holder, then the same defence might be made to it as if in the hands of such original holder.

4. Such also would be the case if the assignor had indemnified the plaintiff.

5. If demand had been made of payment of the certificate before it was received by plaintiff, it must be treated as an over-due note, and be subject to such defences, as it would be in the hands of the original holder.

"BANKING AND EXCHANGE OFFICE OF G. F. LEWIS,
CLEVELAND, March 8, 1853.

"H. B. Castle has deposited in this office eleven hundred and fifty dollars to the credit of himself. Interest if left thirty days, and payable to his order on return of this cirtificate properly endorsed.

(Signed) G. F. LEWIS."

"(Endorsed) H. B. CASTLE."

The plaintiff claimed to recover on this certificate, as a negotiable promissory note.

The defence set up was, that it was not a negotiable note; that it was issued by a mistake, no consideration ever having, in fact, passed between Lewis and Castle for it;

and that the paper was void; that plaintiff had no right to purchase this paper as it did; that it was chargeable with notice of the want of consideration, and that it took it as an overdue note. The plaintiff claimed as a purchaser for value, without notice of any want of consideration. It was in evidence on the trial that, on the 14th day of March, 1853, Castle called at the office of the plaintiff and wished to dispose of the certificate, as he wanted to use a portion of the proceeds before banking hours. It was in proof that defendant's banking house was in Cleveland, and his office open earlier and later than the banks in Cleveland; that the Secretary of plaintiff gave Castle two or three checks on the Commercial Bank of Cleveland, and took the certificate; that he did this to accommodate Castle. It was in proof that Castle knew of the difficulty about the draft, and that defendant refused to pay it, and that he disposed of it so as to get it in the hands of a purchaser for value, without notice of the want of consideration; that after this was discovered by the secretary of plaintiff, (he having called and demanded payment of the certificate of Lewis,) the secretary called on Castle, and Castle on the secretary giving him his individual note, furnished the secretary with funds to use in place of those which the secretary had given for the certificate—the plaintiff still retaining the certificate, and Castle retaining the *private note* of the secretary.

RANNEY, Supreme Judge, charged the jury as follows:

1. That the certificate of deposit was a good negotiable promissory note, and was to be received by the jury as such; that it was for a sum certain, or capable of being rendered certain; that the provision as to the return of

the certificate was nothing more than the law implied, and that therefore the objection made by defendant to the introduction of the certificate, because not negotiable, must be overruled; that the case of Patterson vs. Poindexter, 6 *Watts & Sargeant*, 231, and the case in 4 *Law Journal*, 527, cannot be recognized as law—the contrary has been held in the U. S. Supreme Court, 13 *Howard*, 213.

2. That the plaintiff's charter, (the 6th section) was as follows: "That the capital stock and funds of said corporation shall be applied exclusively to the manufacture of iron, and other business connected therewith and necessary thereto, and no portion of said funds shall ever be employed in banking purposes."

That the defendant claimed "that this transaction was such as the plaintiff had no right to enter into:" they have referred to *Angel & Ames on Corporations*, pages 84, 85, 232, 235; 2 *Cowen* 678; 5 *Conn.* 560; 8 *Ohio R.* 286; 11 *Ohio Reports*, 48; 2 *Kent's Com.* 299. 300; that if the purchase of this certificate was not a transaction coming within the provisions of the charter of plaintiff as above stated, then it was the opinion of the Court that the plaintiff had no power to purchase the paper, and the transaction was void for want of authority given by the charter to plaintiff, to become a party to and purchaser of this paper; that the only power the plaintiff had was given to it by its charter; that all its funds must be applied to the manufacture of iron, &c., and all its other business, and the employment of all its funds, must be subservient to it; and that if this was not so connected or subservient to it, then the plaintiff had no title to this certificate and could not recover.

3. That the defendant claimed "that the circumstances under which plaintiff took this paper were suspicious, and sufficient to put the secretary on inquiry as to the character of the paper before purchasing;" but that this was solely a question for the jury. If they were sufficient, then the plaintiff took the certificate subject to any defence which could be made to it in the hands of H. B. Castle, and in such case, if the certificate was issued by mistake, or without consideration, the plaintiff could not recover.

4. That the same would be the result if, by any arrangement, H. B. Castle had indemnified the plaintiff, or put it in funds to replace those paid out for the certificate in question.

5. That if a demand had been made of the amount due on this certificate, before it went into plaintiff's hands; it was to be treated as an overdue note, and subject to any defence that existed to it in the hands of the original holder.

Verdict for defendant.

For plaintiff—Spalding & Paine; for defendant—Bishop, Backus & Noble.

LEWIS CURTISS
vs.
HUTCHINSON, BINGHAM & CO., and BANK OF CLEVELAND.

[BILL OF REVIEW.]

1. A bond executed in Ohio, negotiable here, if to be performed in New York, and is there delivered, is a New York contract. And such bond not being negotiable there, will be so regarded in the courts of Ohio.

2. Such a bond is subject to the same defence in the hands of an assignee as it would be in the hands of the original holder.

3. The courts, in bills of review, are governed by rules similar to applications for new trial, where there has been a verdict by jury.

4. Where a claim is set up to recover a portion of the amount of such bond by the assignee, because notes of the makers have been discounted on the credit of the bond, he must show he has a connection with the notes in some way, or produce them. It must appear they are not outstanding in the hands of another.

5. An agent exceeding his authority cannot bind his principal, when the person dealing with the agent knows he is exceeding the powers delegated to him.

This is a Bill of Review brought to reverse a decree of the Supreme Court, rendered in this County at the September Term, 1845. The particulars will appear in the opinion of the Court.

RANNEY, Supreme Judge, delivered the opinion of the Court, as follows:

The original decree which this Bill of Review was brought to reverse, was rendered upon a bill to foreclose a mortgage executed by Hutchinson and Bingham to the Tenth Ward Bank, New York city, and the principal contest was between the plaintiff and the Bank of Cleveland, a subsequent mortgagee.

This being a bill of review, the case is situated diff-

erently from what it would be, if this Court had to render the original decree. All that it is our duty to do, is to examine and see if there was evidence in the case to warrant the decree rendered, without coming to the conclusion whether we should have rendered the same decree or not. The rule is much the same in cases of review, as in granting new trials when there has been a verdict rendered by a jury.

The principal contest is *now* between the plaintiff and the representatives of the Bank of Cleveland.

We do not deem it necessary to notice all the points that have been raised and discussed, but only such as are deemed important to a correct decision.

It appears that in the spring of 1839, Hutchinson & Co., were engaged in milling, and had no means of prosecuting their business. The Bank of Cleveland had a mortgage of $20,000 on their mill, and there were judgments against them for $10,000 more. One of the firm, with one Schuyler, went to New York to raise money, but failed of obtaining any from any of the Banks there. But an arrangement was made with the Tenth Ward Bank of New York, by which in a short time, a loan was to be made to them. This was to be done as soon as the Bank should get to going and issue its bills.

The mill property being encumbered by the mortgage to the Bank of Cleveland and the $10,000 in judgments, Hutchinson returned to Cleveland and procured a release from the Bank of Cleveland of its mortage of $20,000, and also obtained an advance from said Bank of the further sum of $10,000, to relieve the property from these judgments, so that it might be mortgaged to the Tenth Ward Bank to raise the money to repay the advances of

the Bank of Cleveland, as well as the amount of the mortgage of $20,000.

On the 10th of April, 1839, Hutchinson & Co. executed a bond in the sum of $35,000 to the Tenth Ward Bank, payable in New York, and also executed a mortgage to secure the same, on the property aforesaid.

Bingham went with this bond and mortgage to New York. But Mead, the President of the Tenth Ward Bank, said he could not then make the promised loan, but if they would take $35,000 in stock, and deliver the bond and mortgage as security for the payment of it, the Bank would, as a part of the arrangement, discount $20,000 in the bills of the Bank, and hold the stock as security for the loan. Bingham accepted this proposition, brought the stock home, and left it with the Bank of Cleveland as security for Hutchinson & Co.'s indebtedness to it.

May 15, 1839, the Bank of Cleveland, becoming alarmed as to its security, took another mortgage from Hutchinson & Co. to secure their indebtedness.

The Tenth Ward Bank, May 13, 1839, assigned the $35,000 bond and mortgage to one Beers, who afterwards assigned it to the plaintiff; the consideration of the transfer to Beers was, as he claimed, some Alabama Bonds furnished by him to the Tenth Ward Bank. The whole arrangement with Hutchinson & Co. by the Tenth Ward Bank, was to enable them to raise money to pay their debts, and that was known to Mead, the President, to be the only reason why Hutchinson & Co. made any arrangement with them.

Matters continued in this manner until September, 1839, when Hutchinson & Co. sent their notes for

$10,000 to Schuyler, to have the Tenth Ward Bank discount them, and also sent $12,000 of the stock, as security.

Mead, the President, would not discount the $10,000, but said if Schuyler would take $2,500 of the $10,000 in stock of the Bank, and become a Director, he would furnish $7,500, the balance of the $10,000 in the notes of the Bank, which were to be put into a miller's hands and go to Michigan—Schuyler claiming that he had made advances to Hutchinson & Co., and that the money was going to him. Schuyler handed the notes of Hutchinson & Co. to Mead, the President, took the $2,500 in stock and the $7,500 in notes of the Tenth Ward Bank, but instead of sending it to Michigan, it was put into a broker's hands in Wall street, and was sent to the Bank for redemption; but the Bank failed to redeem it, and was broken down by this presentation.

The Tenth Ward Bank never had any means of any real value, so far as appears by the testimony, except this Hutchinson & Co. bond and mortgage. Hutchinson & Co. never wished to become stockholders in the Bank, except for the purpose of raising money as before mentioned, and this Mead well knew. At the time Hutchinson & Co. delivered the bond and mortgage, which was done in New York, Mead represented the Bank in good condition—as having a large amount of stock subscribed by good and responsible men, and that it would shortly go into operation, and be in a most flourishing condition—all of which was utterly false, and the stock was never worth anything.

The question now is, *was the Supreme Court justified in coming to the conclusion it did?*

We have no hesitation in saying that the Supreme

Court was clearly warranted from the evidence in the case, in dismissing the original Bill. The whole scheme was a fraud on Hutchinson & Co. and the Bank of Cleveland, and an attempt by the managers of the Tenth Ward Bank to perpetrate a gross swindle upon Hutchinson & Co. At the time the Bank of Cleveland took its second mortgage, no advance had ever been made to Hutchinson & Co., and the stock was utterly valueless.

But it is claimed that Beers, before the Bank of Cleveland took the second mortgage, became a *bona fide* purchaser of this bond and mortgage to the Tenth Ward Bank, without notice of the fraud of the Bank.

1. The bond and mortgage were, it is true, executed in Ohio, but the bond was to be performed in New York, and they were delivered there, and it must be regarded as a New York contract, and be governed by the laws of New York.

2. By the law of Ohio, such a bond would be negotiable, it being payable to assigns; but by the New York law it is not negotiable, and therefore it was transferred, and Beers and the present plaintiff took it, subject to the same defence which existed to it in the possession of the Tenth Ward Bank, and while it belonged to it. Therefore, as the Tenth Ward Bank must have failed, if it had brought the suit to foreclose the mortgage to it, so the present plaintiff must.

It is further claimed by the plaintiff that Hutchinson & Co. received $7,500 by the discount of notes in September, 1839, and that to that amount, at least, the plaintiff should recover.

To this claim there are several objections.—1. The plaintiff does not produce the notes on which this money

was advanced, nor show that he has any connection with them. For aught that appears, they may now be outstanding in the hands of some other person.

2. These notes were sent by Hutchinson & Co. to Schuyler, in New York, as their agent, to be by him presented to the Tenth Ward Bank for discount, according to a previous arrangement. Schuyler had no authority from them to receive $2,500 in stock and $7,500 in money, as he did do, and this Mead, the President, well knew; and Hutchinson & Co. never ratified the transaction by receiving any of the money, or otherwise. This being the case, the transaction itself was void, and Hutchinson & Co. were never bound thereby. "An agent who exceeds his authority cannot bind his principal, where the person dealing with the agent knows he is going beyond the power delegated to him." — *Story on Agency, Sec.* 165 *to* 174.

3. It could not be good in any event, as against the Bank of Cleveland, as it took and perfected its last mortgage in May, and this advance on the $10,000 of notes was in September afterwards.

For these reasons, we have no hesitation in saying that the Supreme Court was justified in dismissing the original Bill, and we therefore must dismiss this Bill of Review.

Foote, having been of Counsel, did not sit in this case.

For plaintiff, H. Foote; for defendant, F. T. Backus.

BACON *vs.* GIBBS.

[CHANCERY.]

1. Where B., a father, deeds his farm to a married daughter, taking back a life lease from the daughter alone, and an agreement for the support of himself and wife during life, and she commits them to the care of G., who abuses them, and she and her husband also deed G. the property, the court will restore the property to the father for life, and require G. to pay B. the difference between the living he did and should have furnished.

2. For the time B. was absent from G., he to be allowed such sum, for support, to be paid by G., as should be reasonable, and for the future to have the use of the farm and such other sum as might afford a reasonable support in addition—all of which to be a lien on the farm.

RANNEY, Supreme Judge, stated the case, and gave the opinion, as follows :

The complainant was an old man in 1836, and now very old; and in 1836 conveyed his farm to his daughter, Mrs. Sexton, and took back from her a life lease of the property, executed by herself alone, she being a married woman.

The husband of Mrs. Sexton wanted to go West, and so leased the property for five years, and then sold it, subject to the life lease, to Gibbs, who by a suit in ejectment dispossessed the lessee. Gibbs then put his son in possession of the property, and undertook to support the complainant and his wife, who by the arrangement with Mrs. Sexton, were to have their living or be supported for life, as a consideration for the original conveyance and the use of the property.

It is perfectly clear that Gibbs, while he had the care of these old people, treated them as he should not; he treated them very badly till 1851, when they were obliged

to leave Gibbs, and seek shelter elsewhere, as their lives were rendered miserable with him. It is claimed Bacon and his wife conducted badly. If they did, it was no excuse for the conduct of Gibbs.

It is clear that the life lease to the complainant being signed by her alone, was a nullity, but she had no right to transfer the keeping of her parents to third hands, or place them in the care of strangers; it was a breach of the contract with the complainant in so doing.

In cases of this kind we must apply the rule applicable with much strictness.

The usual course in similar cases is to rescind the contract holding the parties to an account. If we should take that course in this case, Sexton's wife after having sold the property and receiving pay for it, might again take the property as the heir-at-law of the complainant.

Instead of that, we will give to the complainant what we think he was substantially entitled to under the arrangement with his daughter, Mrs. Sexton:

1. Restoring the property to the complainant for life.

2. We shall decree that Gibbs shall pay to complainant the difference between the living he *did* furnish him and his wife, while they resided with young Gibbs, and the living he *should* have furnished, up to the time Bacon left.

3. Complainant shall be allowed for his annual support since he left Gibbs, such a reasonable amount as it was right and proper for him to have, under all the circumstances of the case.

4. The complainant having the land restored to him for life, we order that a master shall ascertain what is a reasonable sum for the complainant's annual support here-

after, and we order that from that sum the annual value of the land shall be deducted, and the balance be paid in specified installments.

5. We order that all these several sums be a lien on the property in question, and that on a failure to pay them according to the decree to be entered in this case, then that the premises be sold to pay the same.

H. D. CLARK for plaintiff.

BISSELL & MYERS for defendants.

BREWSTER *vs.* CLOUGH and others.

[IN CHANCERY.—RESERVED FROM SUMMIT COUNTY.]

1. A mortgage delivered for record has priority over a claim by W. under an *agreement* for a mortgage, although the mortgagee knew of W.'s claim when he received his mortgage.

2. Although W.'s claim for a mortgage cannot prevail against the recorded mortgage, yet W.'s demand being for the purchase money of the land mortgaged, which was known to the mortgagee when he took his mortgage, the mortgage will be postponed to W.'s right under his vendor's lien, although the title which W. held to the land and sold was only an equitable one.

The case was in substance this: Brewster agreed with Whittlesey to examine his farm for coal, and if coal was found, Whittlesey was to open the pits, and to have one-half of the proceeds of the coal taken out, and a deed of one-half the farm. Whittlesey proceeded to perform his contract, but before completing it, he sold his interest in the agreement with Brewster to Clough, who was to pay Whittlesey $3,000 in different payments, and was also to fulfill Whittlesey's agreement with Brewster, and was to take a deed from Brewster and mortgage the property to Whittlesey to secure any balance due him. Brewster

advanced to Clough $400 to pay to Whittlesey on his agreement, and $200 to open the pits. Brewster, well knowing the agreement between Whittlesey and Clough, gave Clough a deed and took a mortgage to himself to secure the $600 advanced. Whittlesey afterwards ascertaining this, claimed that Brewster's mortage was fraudulent as to him, but he took a mortgage from Clough, not waiving his right to have the amount due from Clough to him first satisfied.

RANNEY, Supreme Judge, delivered the opinion, holding:—

1. That as Brewster's claim was an honest demand, and his mortgage was recorded before Whittlesey's, it must prevail over Whittlesey's; that the knowledge of Brewster of Whittlesey's right to a mortgage from Clough, made no difference, the statute giving the priority to the mortgage first delivered for record.

2. The Court further held, that although the mortgage of Brewster must have priority over Whittlesey's, yet Whittlesey had a vendor's lien upon the land for his purchase money, unless he was prevented from asserting this lien, because his interest in the land sold to Clough was only an equitable one.

3. That the Court could not see why an equitable interest in land amounting to the whole value of the land, should not entitle the vendor to his vendor's lien, the same as though he had sold the equitable coupled with the legal title.

Decree enforcing Whittlesey's vendor's lien, as having a priority over Brewster's mortgage.

ELIZA DUNCAN *vs.* JAMES DUNCAN and others.

[Petition for Dower.]

1. To constitute a valid marriage at common law, all that is required is persons competent to contract and an agreement to take effect immediately, which need not be followed by cohabitation, or an agreement to take effect in future, followed by cohabitation.

2. It is not necessary to the validity of such marriage that it be solemnized by an officer or clergyman, &c.

3. This rule prevails in Ohio and the United States generally. In England it is altered by act of Parliament.

The husband of the plaintiff having deceased, she filed her petition for dower, which was opposed by James Duncan, defendant, because, as he claimed—1st, the plaintiff was never married to the deceased; 2d, the deceased had another wife living at the time plaintiff claimed to have been married to the deceased.

It appeared in evidence that no marriage had ever in fact been solemnized between the plaintiff and Alexander Duncan, the deceased, but from 1847 to the time of his death, Duncan acknowledged the plaintiff as his wife—she acknowledged him as her husband—they passed as husband and wife, cohabited together, and had children. It also appeared in evidence that Alexander Duncan had a former wife living in Ireland, but it also appeared that she had deceased some six months previous to the death of Duncan. There was testimony to show that after the death of the former wife, the petitioner reminded the deceased of his promise to marry her, and he then renewed it, and finally died without any ceremony being actually performed. The petitioner and deceased having lived together as husband and wife from the time of making this

last engagement till Alexander Duncan died, it was claimed by the petitioner's counsel, Messrs. J. ADAMS and WM. ABBEY, that the evidence in the case showed a valid marriage of the petitioner and the deceased, at common law, and that a solemnization of the marriage was not necessary to render it legal, and that the law of Ohio regulating marriages was merely directory, and did not render a common law marriage void. They referred to 2nd vol. *Greenleaf's Ev.*, sec. 460; 2 *Salk*, 437; 1 *Hill*, 270; 3 *Marshall, Ky. R.*, 1198; 8 *Paige*, 574; 9 do., 611; 2 *Kent's Com.*, 86–91; 2 *N. H. Rep.*, 268; 1 *Gray*, 119.

S. I. NOBLE, and AXTELL & PRENTISS, for defendants, claimed that the common law marriage without a solemnization, is contrary to the spirit of the legislation of this State, and therefore invalid.

The Court, per RANNEY, Supreme Judge, delivered the opinion, as follows:

We are satisfied that the deceased had a former wife in Ireland, but the proof is just as clear that she was dead at least six months before the decease of Duncan. It is clear that after the former wife's death the petitioner called on the deceased to fulfill his promise to marry her, and he then agreed to do so, but died without having any marriage ceremony performed. They, however, lived together as if married, and passed as husband and wife, and acknowledged themselves as such up to Duncan's death. Was this a valid marriage by the common law, and also by the laws of Ohio? for it is to be governed by the law of Ohio, if *it* presents a different rule from the common law.

A general summary of the law upon this subject, is

found in *Greenleaf on Evidence*, vol. 2, sec. 460, which is as follows:

"Marriage is civil contract *jure gentium*, to the validity of which the parties able to contract is all that is required by natural or public law. If the contract is made *per verba de persenti;* tho' it is not consummated by cohabitation; or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in absence of all civil regulations to the contrary. And though in most if not all the United States there are statutes regulating the celebration of the marriage rites, and inflicting a penalty on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute, declaring that all marriages not celebrated in the prescribed manner, shall be absolutely void; or that none but certain magistrates or ministers shall solemnize a marriage—any marriage regularly made according to the common law, without observing the statute regulations, would still be a valid marriage."

According to this rule, in order to constitute a valid marriage, all that is necessary by the common law, is, parties competent to contract, and an agreement to take effect immediately, whether followed by consummation or not, or in the future followed by subsequent cohabitation. In this case we find abundant evidence *per verba de futuro*, and subsequent cohabitation continuing up to the time of Duncan's death, from which to find a valid marriage. By the common law then the petitioner was the wife of Alexander Duncan.

Does the law of Ohio alter this? It is contended that

it does, and that such a marriage is contrary to the spirit and policy of our legislation.

By a comparison of the laws of Ohio with the laws of other States on this subject, it will be found that our laws are not materially variant from the laws of other States, and it is believed that, in nearly if not all the United States, a marriage valid at common law is legal; and the prohibitions and penalties apply only to the officers who issue marriage licenses or solemnize marriages, leaving the marriage itself valid and binding. We see no reason for the establishment of a different rule in Ohio.

In England, by act of Parliament, a marriage by the common law is declared void, unless solemnized by some officer or clergyman prescribed by law; but in the United States a different policy prevails.

This conclusion has been arrived at in part in view of the serious consequences that a contrary holding would produce.

The Courts have gone this length rather than render criminal the intercourse following these common law marriages, and render illegitimate the issue of such marriages. To do the latter would be to punish the innocent for the sins of others.

In view of all the facts of this case, we are brought to the conclusion that the petitioner was the lawful wife of Alexander Duncan, and entitled to dower in the lands of which he died seized. We decree accordingly.

SIMMONS and others, *vs.* WILLIAM P. BROWN.

[In Error.]

1. A note in which the payee's name is blank, is payable to bearer.
2. It is not ground for error that a petition is not sworn to; that must be taken advantage of on motion before judgment.
3. A power of attorney to confess judgment on such note in favor of the holder thereof, is available to the person who may be the holder of the note at the time judgment is rendered, although not the original holder, or payee
4. If the record shows a judgment confessed and execution awarded, it is sufficient, although there is no technical finding and rendition of judgment.
5. The requirements of law as to making up and signing the records of the common pleas are only directory, and the proceedings are valid without such making up and signing.

In the Court of common pleas, defendant in error obtained a judgment on a cognovit attached to a note payble to the order of ——; the name of the payee being left blank. The note was for $2,000 at 90 days; the Cognovit authorized a judgment to be confessed in favor of the holder of the note, and errors to be released.

The petition averred that Wm. P. Brown was the holder of the note; that there was due to him on said note $2,000 with interest, &c., (not describing the note, but only referring to a copy attached to the petition.) Petition was not verified.

The attorney who confessed the judgment in his answer did not admit any amount due, but merely confessed a judgment "for $2,000, and interest from the time said promissory note, in said petition mentioned, became due," releasing errors, &c. In rendering judgment, the Court did not find any amount due, but says, "Said attorney, for defendant, confesses a judgment in favor of plaintiff

for $2,391\frac{33}{100}$; and the Court award execution to collect the same," &c.

Plaintiffs in error claimed the judgment should be reversed, and made 11 assignments of error, among which they claimed a reversal, because there was no payee in the note; because petition was not sworn to; because judgment was rendered without the Court having any legal evidence of the claim of plaintiff; because the record of the case in common pleas was not made up by the clerk and subscribed by the presiding Judge, as required by law; because no judgment was in fact rendered by the Court below, but only execution awarded.

Fitch, Judge, delivering the opinion of the Court, *held*—There was no error apparent in the record; that the petition sufficiently alleged the plaintiff's right in the common pleas to recover the amount due on the note as the holder.

That there being no payee in the note, it must be held as payable to bearer, the same as a note made to a fictitious payee, which has always been held as payable to bearer.

That it is no error that a petition is not sworn to; that is a defect to be taken advantage of before judgment, on motion.

That as to the point "that the record shows no legal evidence before the Court of common pleas to authorize the judgment," this Court will presume that the proper proof was before it to authorize its finding and judgment.

That the requisitions as to making up the records of the common pleas and the signing thereof is directory, and a failure to do so cannot prejudice any person who has acquired rights by virtue of the judgment.

That although there is no technical finding and rendering of judgment by the court of common pleas, yet what is apparent from the record is equivalent thereto, and is substantially a good judgment.

Judgment of the common pleas affirmed.

For plaintiff in error, FLOYD & BOSTWICK. For defendant in error, WILLIAMSON & RIDDLE.

POLLARD *vs.* STATE OF OHIO.

[IN ERROR.]

A sale of intoxicating drinks to a minor under twelve years of age, as agent of S., is a sale to S., and need not be upon the written order of the parent, &c., of the minor, to render such sale lawful.

Defendant was convicted in the Probate Court for a violation of the 2d section of the law against sale of intoxicating drinks, which provides against sale to minors, "*unless upon a written order of their parents, guardian, or family physician.*"

The sale in this case by defendant was of a pint of whisky to a minor 12 years of age, as the agent of one Smith, and this agency was made known at the time the sale was made.

FITCH, Judge, delivering the opinion, held: — That as there might be a sale by an agent, so there might be a sale to a person by his agent; that this sale, although to a minor, was only made to him as agent of Smith, and therefore a sale to Smith, and not within the provisions of said 2d section.

Judgment of Probate Court reversed.

WILLIAMSON & RIDDLE for the State. LYNDE & CASTLE for Pollard.

LEFFINGWELL *vs.* CASTLE.

1. Immediately on appeal from the Common Pleas to the District Court, the penalty allowed by the law attaches, and it cannot be avoided by tendering the amount of the debt and costs before judgment in the District Court.

2. In cases where there is an absence of defence and an appeal for delay, the penalty will be only five per cent. unless it appears that the appeal was also for the purpose of vexing and harrassing the plaintiff.

Previous to the sitting of this Court, defendant offered to pay the amount due on the mortgage and all the costs, but would not pay any penalty. Plaintiff refused to receive the money and discharge the claim unless the penalty was also paid; and the question submitted was, at what time the penalty attached, and whether it should be 5 or 10 per cent.

FOOTE, J., delivered the opinion, holding:—

1. That the right to the penalty attached in cases where parties were entitled to it when the appeal was perfected; and that the defendant could not, by tendering or paying the amount of debt and costs, avoid the penalty. If that could be done, then a party could obtain the delay consequent on appeal, and avoid the penalty allowed by law altogether.

2. That unless something more appeared in the case than a mere default or absence of any defence on the part of the defendant, no more than 5 per cent. penalty would be allowed.

3. To entitle the appellee to 10 per cent. penalty there must be not only an absence of all defence, but proof that the appeal was taken not to obtain further time merely,

but that the delay was for the purpose of vexing and harrassing the appellee.

Judgment accordingly.

For plaintiff, BISHOP, BACKUS & NOBLE. For defendant, BOLTON, KELLY & GRISWOLD.

THOMAS & GREINER et al. *vs.* FOREST CITY BANK.

[IN ERROR.]

In a suit on a protested foreign bill of exchange, for damages as well as principal, the bill being addressed to D. & Co., Phila., Pa., it will be presumed that the drawees resided there, and the Court will take judicial notice that such place is out of the State of Ohio.

The defendant in error recovered a judgment by default in the common pleas for $1,086 50, being principal and interest and six per cent. damages on a protested draft drawn and endorsed by plaintiff in error, and directed to "Messrs. Drexell & Co., Philadelphia, Pa."

Plaintiffs in error claimed that it did not appear sufficiently from the record that the drawees resided in Philadelphia, Pa., and that they did not reside in Ohio. The only evidence of the drawees' residence was the address to them in the draft, as above described. It was also claimed by plaintiff in error, that the Court could not take judicial notice that the Pennsylvania named in the address, was not in this State.

STARKWEATHER, Judge, in delivering the opinion of the Court, held:—

1. The draft being addressed to persons in Philadelphia, Pa., it would be presumed they resided there.

2. That the court may take judicial notice of the di-

vision of the country into States, Counties, &c., and of the names by which they are designated, and of the relative position which they bear to each other—and that the Court did not err in taking judicial notice that Pennsylvania was out of the State of Ohio, therefore judgment is affirmed, with costs.

H. GRISWOLD for plaintiff in error. MASON & ESTEP for defendant in error.

LEISH *vs.* CROMWELL and others.

[ERROR.]

A judgment confessed by virtue of a warrant of attorney authorizing judgment to be confessed in favor of the *holder* of the note, and "against ——," is not erroneous because the plaintiff is not the payee, or the name of the person is blank against whom judgment may be confessed.

The record in this case showed that a judgment was taken in the common pleas, by warrant of attorney attached to a promissory note, and payable to Wm. Slade, Jr., attorney for the above defendants, and the power of attorney authorized the judgment to be confessed in favor of the holder of the note and "against ———," the names being left blank as to the persons against whom the judgment was to be confessed. Slade, before judgment, endorsed the note to the above named defendants.

The principal error assigned was, that the warrant of attorney did not authorize the judgment contained in the record.

The Court by RANNEY, Supreme Judge, held:

1. That the warrant of attorney authorized a judgment in favor of the holder of the note; that the judgment was properly confessed in favor of Cromwell and others,

they being the owners and holders of the note; that the power of attorney in 19 *Ohio R.* 130, *Osburn vs. Hawley*, did not authorize a judgment in favor of the holder, and in that it is distinguishable from this case.

2. That, as the warrant authorized judgment for the amount due on the note, if the word "against" was dropped, the meaning would appear clear that it was the design of the signers of the power of attorney, to authorize a confession of judgment against the makers of the said note.

Judgment of the Court of common pleas affirmed.

BOLTON, KELLEY & GRISWOLD for plaintiff in error

WM. SLADE, Jr., for defendants in error.

STURGES & HALE *vs.* E. G. WILLIAMS.

[ERROR.]

A promissory note drawn by R., payable generally to W.'s order, and by W. endorsed for R.'s accommodation, no blank being left for inserting a place of payment, may be avoided by W., if R. before he parts with the note inserts in it a place of payment with the knowledge of the endorsee, and without the knowledge or consent of W.

The facts of this case are as follows:

E. Rawson, for his own accommodation, drew a note, of which the following is a copy:

"$500. CLEVELAND, March 7, 1853.

"Two months after this date, I promise to pay to E. G. Williams, Esq., or order, five hundred dollars, value received.

"(Signed) EDWARD RAWSON.

"(Endorsed) E. G. WILLIAMS."

This note was taken by Rawson to the plaintiffs to be by them discounted for his (Rawson's) benefit. The note, before it was discounted, was altered by E. Rawson in the plaintiffs' banking room, (as was admitted,) with their knowledge, by inserting in the body of the note, between the words "order" and "five," the following: "Payable at the office of Sturges & Hale." So that the note was changed from one payable generally, to one payable at the office of the plaintiffs, in the city of Cleveland

The Court below charged the jury "that the writing of the words 'payable at the office of Sturges & Hale,' on said note, by said Rawson, as above stated, was a material alteration of the note, and if made without the knowledge or consent of Williams, he was thereby discharged from the payment of the note."

GRISWOLD & LOOMIS, attorneys for plaintiffs:

Claimed that the note was made for E. Rawson's accommodation; and although endorsed by Williams, it was not a valid obligation, until it was negotiated for value to the plaintiffs; and that until it was negotiated, Rawson being the principal, was like the acceptor of a bill of exchange, who had a right to designate where the money should be made payable; and they referred to 18 *Johnson's Reports*, 315, *Bank of America* vs. *Woodworth*. They also referred to the opinion of Chancellor Kent in the case of *Woodworth* vs. *Bank of America*, 19 *Johnson's R.* 393, and contended that it contained the law, although a majority of the Court of Errors held otherwise.

BACKUS & NOBLE, attorneys for defendants.

Claimed that the ruling of the Court of Common Pleas

was right; that the alteration of the note by Rawson, after it had been endorsed by Williams, without Williams' knowledge and consent, was a material alteration of the note, and discharged Williams, especially as it was done with the knowledge of the plaintiffs. They referred to *Woodworth* vs. *Bank of America*, 19 *Johnson's R., p.* 418; *opinion of Skinner, Senator;* also *Smith's Leading Cases*, 714 *and* 715, and 24 *Wendell*, 347, *Napo & Green* vs. *Fuller & Patterson.*

The Court, per RANNEY, Supreme Judge, delivered the opinion as follows:

The note in question was not legally in existence till it was discounted by Sturges and Hale. Then as Williams endorsed the note and it was payable to his order, it must be presumed that he was a mere surety, and entitled to all the privileges of one. If he had endorsed the note, and it had been payable to Sturges and Hale, he would have been deemed an original maker, and *prima facie* might have been treated as such.

This alteration was without the knowledge of Williams and if enforced at all, must be enforced in its present form.

When Williams endorsed the note and delivered it to Rawson, there being no blank left in it to be filled up in order to make it complete, he had a right to presume that Rawson would use the note as he had received it from Williams when he endorsed it. It would have been otherwise if a blank had been left to be filled up by Rawson.

The Supreme Court, in case of *Selser* vs. *Brock*, 3 *Ohio State R. p.* 302–308, decided at the December term, 1854, "That when one of two innocent persons must

suffer by the fraud of a third person, he who trusted the third person and put into his hands the means to commit the wrong, must bear the loss."

Now, when Williams endorsed this note and placed it in the hands of Rawson, he put it in the power of Rawson to alter the note, any time before it was delivered by Rawson, and before it took effect as a note. And if Rawson had altered it at any time before delivering it to Sturges and Hale, without their knowledge, and they had purchased it *bona fide*, then according to the principle decided in the above case of Selser vs. Brock, Williams ought to be bound by it, as by entrusting it to Rawson to be negotiated, he placed it in the power of Rawson to change the place of payment, or to make other alterations in the note, whereby a third person and innocent holder of the note might be deceived.

This case, however, is different. Sturges and Hale had knowledge how Williams intended to have the note payable, and they knew he was not present to consent to the alteration, and they could not therefore claim as innocent *bona fide* purchasers of the note in its altered form. And we are now brought to this point—"Was this alteration *material?*" If not, then the judgment of the Court of common pleas was erroneous, and should be reversed. If it was material, then the judgment must stand.

A party has a right to say what kind of a contract he will enter into, and when entered into, it cannot be changed without his consent, even so as to make it beneficial to the party entering into it without rendering it void as to all who know of such change.

The undertaking of Williams was, that on condition that the holder of this note would demand payment of

it of Rawson personally, or at his residence, when it should become due, then in case the note should not be paid, if he, (Williams,) was notified thereof, he would pay the note. In the altered form of the note, the condition was, that provided Rawson had no funds at the office of Sturges & Hale to meet the note when due, or if payment was demanded there and not made, and he was duly notified thereof, then he would pay the note. In the latter case something different is contemplated to be done from what was contemplated in the former, and the condition is a different one. If an alteration can be made so as to change the place of payment, then it might be so altered as to be made payable in New York, where the rate of interest is seven per cent. instead of six; and then, would such an alteration not only change the place of payment, but would also increase the amount in case the note was on interest. We must conclude then, that the alteration was material, and being done with the knowledge of the plaintiffs in error, it avoids the note. If they had purchased it having no knowledge that the alteration was without Williams' consent, and before it had ever taken effect as a note, then our conclusion would have been otherwise.

In the case of *Bank of America vs. Woodworth*, 18 *Johnson's R.* 315, which was a case where the place of payment was altered by the maker before delivery to the endorser, before it was discounted, and without the knowledge of the endorsee or indorser, where the Supreme Court of New York held that the endorser was not discharged thereby, and which judgment was reversed by the Court of Errors, 19 *Johnson's R.* 191, we regard the decision of

the Supreme Court as the better law, and should so hold if that case was presented to us. The case now before us is materially different from that, and we must affirm the judgment of the Court of common pleas.

NOTE BY THE EDITOR.

The next number of this work will be occupied mostly by cases from the District Court of Cuyahoga County. There will be a few cases from other Courts.

Arrangements have already been made to procure reports of all the leading cases that, up to this time, have been disposed of, either in the U. S. Circuit or District Court for the Northern District of Ohio, and of those which shall hereafter be disposed of in the same Courts. Most of the cases heretofore disposed of in these U. S. Courts, will be collected and published in one number.

I shall also endeavor to collect, condense, and classify, the rules of these Courts, most necessary to be understood, so that those on a particular subject may be comprehended at a glance.

Arrangements have also been made to obtain reports of cases of importance, disposed of in the Common Pleas of this county; and so far as application has been made for aid from any source, it has been readily responded to.

There can be no doubt, that, if a person competent will undertake the enterprise, he can publish a *Law Periodical* in Cleveland at a remunerative compensation, and can publish one that will be a public benefit. It is by no means uncertain that this may be the commencement of such an undertaking, whether it shall continue under the direction of the present publisher or not.

UNITED STATES CIRCUIT COURT,

FOR THE

NORTHERN DISTRICT OF OHIO,

JULY TERM, 1856.

BEFORE HON. JOHN M'LEAN, OF THE SUPREME COURT, AND HON. H. V. WILLSON, OF THE DISTRICT COURT.

SAMUEL W. STIMSON *vs.* J. W. SCOTT.

[In Chancery.]

The city of Toledo, under the Municipal Corporation Law of 1852, passed ordinances for the improvement of a part of Summit street, and assessed the expense at a fixed sum per foot front on the land abutting on the improvement, and authorized plaintiff to collect the assessments in his own name he having done the work in making the improvement. *Held*—

1. The plaintiff had a right in his own name to collect the assessments; and that this Court has jurisdiction of this case, the plaintiff being a citizen of Ohio and taking by operation of law, and not by assignment under the 11th section of the U. S. Judiciary Act of 1789.

2. Such assessments are not unconstitutional under the new Constitution of Ohio.

Opinion of Judge McLean:

This suit is brought to enforce the collection of a special assessment, levied by ordinance of the City Council of the city of Toledo, for the grading and improving of Summit street, in said city, under the Municipal Corporation Law of Ohio, passed 1852. The City Council

passed an ordinance for the improvement of a portion of Summit street, and assessed the expenses of the improvement on the land fronting or abutting on said improvement, at a certain amount per foot front on the street, and then contracted with the plaintiff to do the work necessary to complete the improvement. This work was done and accepted by the city. Another ordinance was also passed, whereby the special assessments for this improvement were to be paid to the plaintiff, and he was authorized by said ordinance to proceed and collect them in his own name. Among these assessments was one against the defendant.

The defendant demurs to the complainant's bill, and makes several points which will be noticed in this opinion.

1. *It is claimed, generally, that this Court has not jurisdiction of this case.*

On the record, there is no doubt but the proper parties are before the Court, the complainant being a citizen of New York, and the defendant a citizen of Ohio. But it is claimed that this Court cannot take jurisdiction of the case, because the plaintiff is the assignee of the claim on which he sues, and therefore comes within the 11th section of the Judiciary Act of the United States, of 1789, which is as follows:

"Nor shall any District or Circuit Court have cognizance to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

The plaintiff is not an assignee within the meaning of this statute. He does not take as assignee of the claim

on which he sues, but by operation of law, and the proceedings and ordinances of the City Council of the city of Toledo; and it makes no difference that the city of Toledo had also a right to proceed and collect this assessment in its own name, so long as it did not exercise that right.

It is well settled, where a person, a resident of one State, has acquired a right under the statute of another State, he may resort to the Federal Court to enforce that right.

So a person having a lien, by a State law, upon a vessel, may go into Admiralty Court to enforce the lien.

The case of *Deshler vs. Dodge* in the Supreme Court of the United States, 16 *Howard's R.* 622, is a much stronger case than this against the jurisdiction of the Court. That was a case where Dodge, as Treasurer of Cuyahoga County, Ohio, distrained for taxes $38,592, of bank bills belonging to certain Banks in Cleveland, in said County, which taxes the Banks claimed were unconstitutionally assessed against them, and they sold the bills in the hands of Dodge to Deshler, of N.Y., who brought a suit in replevin for them in this Court, and took the money out of the hands of Dodge, yet the Court held the U. S. Circuit Court had jurisdiction of the case.

2. It is objected that the tax is unconstitutional by the new Constitution of Ohio, as the tax is not assessed according to article 12, sec. 2, of this new Constitution.

This article refers to general taxation for revenue purposes, and has no reference to special assessments for local improvements.

But we can see no objection to this assessment from inequality. It is levied by a "uniform rule" on a particular district, that is, at a certain amount per foot front.

This is the general rule every where, and it is right. No more equal mode could be fixed upon.

It is said that this assessment should extend to the whole street, and not a portion of it, as in this case. From aught that appears, the assessment does extend over all that part of the street not before improved.

We see no objection to maintaining this suit, on any of the points raised.

Demurrer overruled. Decree for complainant.

For complainant, BASSETT & KENT. For defendant, M. R. WAITE.

C +

THE

CLEVELAND LAW RECORD,

DEVOTED PRINCIPALLY TO THE

REPORT OF LEADING CASES

IN THE SEVERAL COURTS IN OHIO AND OTHER STATES,

AND ESPECIALLY TO THOSE IN THE

District Court of Cuyahoga County, O.

BY J. P. BISHOP,
ATTORNEY AND COUNSELOR AT LAW.

VOL. I.—NO. II.

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1857.

DISTRICT COURT, CUYAHOGA COUNTY,

OCTOBER TERM, 1855.

Reports of Cases decided in this Court, by Judge Ranney, of the Supreme Court, and Starkweather, Foote, Fitch and Otis, Judges of the Common Pleas. The Reports were submitted to and approved by the Judges respectively who delivered the Opinions.

E. J. ESTEP *vs.* E. ADAMS et al.

[In Chancery.]

A. purchased land of S., in 1835, in Cuyahoga Co., Ohio, and mortgaged it back for the purchase money. After the mortgage money became due, and while A. was in possession, D. recovered a judgment in the Common Pleas in said County vs. A. A. afterwards surrendered possession to the mortgagee, who commenced a foreclosure of his mortgage. At the same term the bill to foreclose was filed and the suit pending in said Court, a second judgment was recovered against A. in the same Court, but recovered on a day subsequent to to the commencement of foreclosure. Neither of these judgment creditors was made a party to the proceedings to foreclose. The mortgaged premises having been sold under these proceedings, and the judgments assigned to Estep, he claimed a right to redeem said premises by paying the amount of the mortgage. *Held*—

1. Plaintiff had a right to redeem as to the 1st judgment.
2. That the second judgment having been obtained *pendente lite*, it was not necessary to make the judgment creditor party to the foreclosure.
3. *Whether* a judgment is a lien on mortgaged premises, the mortgagor being out of possession and the condition forfeited. *Query.*
4. When such right to redeem exists, no period short of twenty-one years will bar it.

This case shows that the defendant, Adams, purchased land of Swan, in Brooklyn, in Cuyahoga County, in 1835, mortgaged the same to said Swan at the same time to secure a part of the purchase money, that after the mort-

gage money became due, but while the mortgagor was in possession, and at the Oct. (1837) Term of Cuyahoga Common Pleas, I. P. Dorman recovered a judgment against Adams; Hepburn & Shepard, at the November Term of the same Court, (1839,) recovered another judgment; but at the latter time Adams was not in possession, but had surrendered possession to the mortgagee; both of which judgments were kept alive by issuing executions. The second judgment was recovered at the same Term at which the proceedings were commenced to foreclose the mortgage, but a day subsequent to such commencement. At the November Term (1839) suit was commenced to foreclose the mortgage, without making the said judgment creditors parties. A sale was made of the mortgaged premises under the foreclosure proceedings aforesaid, and the premises were sold to said Swan as upon executions upon judgments at law.

Estep, as assignee of the judgments, claims the right to redeem said mortgaged premises, by paying the amount of said mortgage.

The Court, per FOOTE, Judge, *held*, that Adams, the mortgagor, being in possession of the premises at the time the judgment was recovered by Dorman, although the condition of the mortgage was forfeited before that time, yet the judgment was a lien upon the mortgaged premises subject to the mortgage of Swan; that the Courts of this State had repeatedly held, that in cases like this the judgment is a lien on the mortgaged premises remaining in possession of the mortgagor at the time of the recovery of the judgment.

That, as to the judgment recovered by Hepburn & Shepard, it was situated differently. When that was

recovered, or actually rendered, suit had been commenced to foreclose the mortgage; that it was a settled principle in equity proceedings, that persons acquiring an interest by their own acts in the subject matter of a suit *pendente lite* were not entitled to be made parties; that for that reason the suit to foreclose might properly proceed without any notice being taken of the Hepburn & Shepard judgment, or making the plaintiffs in that judgment parties.

Whether a judgment is a lien upon mortgaged premises, the condition being forfeited and the mortgagor out of possession at the time of a judgment being rendered against him, the Court declined to express an opinion.

That if the plaintiff had a right in other respects, he would not be deprived of his right to redeem, because his equity had become stale. Sleeping upon his rights for thirteen years, if his judgments had been kept alive during that time, would not prevent his coming into this Court for relief. No period short of twenty-one years would bar him of that right.

Therefore, as to the Dorman judgment, the plaintiff had a right to redeem, and as to the Hepburn & Shepard judgment, no right of redemption existed. Decree accordingly.

ESTEP for plaintiff. WILLIAMSON & RIDDLE for defendants.

WILLIAM SLADE, JR., *vs.* DOOLITTLE & NORTH.

[MOTION TO STRIKE OFF ANSWER.]

1. A counterclaim or set-off will not be struck off on motion, although defectively stated, if the same is capable of being so stated as to constitute a defence.

2. The Court will be liberal in allowing amendments, to promote substantial justice.

3. When land is sold as a part of a subdivision, in which is a public square, the vendors cannot vacate the square, without making good to the vendees any injury sustained thereby; and such injury may be set up under the Code, to reduce the amount sought to be recovered by the vendors or their assignees.

The plaintiff claimed in this case, that he was the vendor's assignee of contracts for the sale by Pelton, &c., to Doolittle, of certain sub-lots on University Heights, in Brooklyn, in this county. A plat had been made of the property subdivided, and as a portion of the plat, a public park, containing five acres of land, was laid out; and the property purchased by Doolittle was near this park. It was also a matter of public notoriety, that an University was to be established and kept up on this subdivision, and a portion of the subdivision was set apart for University grounds, and a building was erected, and a school established; but it was discontinued, and still remains so. The contract does not stipulate for the establishment of the school, or continuance of it. After the execution of these contracts, the proprietors of the subdivision vacated so much of the same as applied to the park, and sold the park out to another person.

Doolittle sold some or all of his interest as purchaser, to North.

The defendants set up the above facts as a defence, by counterclaim to the claim of plaintiff, to lessen the amount

he was entitled to recover on the contracts. 1st, they claim that the University is not kept up, and there is no prospect of its being kept up; 2d, that the lots sold as aforesaid are worth less by $900, on account of vacating the plat.

The plaintiff moved to strike out both of these claims interposed by the defendants, because they constituted no defence to the claim of plaintiff, if proved.

The Court, per RANNEY, Supreme Judge, *held*—

That a motion to strike out a counterclaim or set-off will not be entertained, when it appears merely that the defence is defectively stated. If it appears from the statement that the matters defectively set forth may be stated in any form, so as to avail the party as a defence in whole or in part, the remedy of the party objecting is to have the statement rendered more certain, by way of amendment, and the Court will be liberal in the allowance of amendments in such case, on motion of either party, in order to have substantial justice done.

But if it not only appears from the answer put in, that the matters set up as a defence, though defectively stated, cannot in the present form, or by way of amendment be made available as a defence, then so far as the answer sets up such inadmissible matter, it will be struck out on motion.

Try the motion by this rule, and the Court comes to this result — that so far as the neglect to establish and keep up an University is concerned, the defence insisted on in the answer must be struck out, as asked in the motion; that as to so much of the defence as relates to vacating the plat, that will not be struck out, but the motion must be denied.

That so far as the keeping up of the University is concerned, it no where appears that it was to be kept up by the vendors, or that they were in any way to be responsible therefor; that so far as vacating the plat is concerned, that stands on a different principle. It was a portion of the subdivision of which the land purchased by Doolittle was part; and though not acknowledged and recorded so as to be a dedication to the public, yet it was a portion of the subdivision into which Doolittle purchased, and the proprietors having sold lots according to this plat, equity will require them to do justice.

If under the former practice, a bill for specific performance had been filed, this defence might be interposed; and the code permits any defence that might be made in a proceeding for specific performance by vendors.

Equity might interfere, and prevent any material alteration of the plat or subdivision, so as to interfere with the value of the lots sold; and if there is a material alteration of the subdivision whereby the defendant's lots are lessened in value, then the purchaser has a right to have the amount of the diminished value deducted from the purchase price; that the vendor has no right to lessen the value of the land sold by him, by vacating streets or public grounds, with reference to which a party purchases, without being responsible to the purchaser in damages.

For plaintiff, WM. SLADE, JR., and GRISWOLD & LOOMIS. For defendants, WYMAN & THAYER, and BISHOP, BACKUS & NOBLE.

HUBBARD *vs.* CARMAN.

[ERROR.]

Lot No. 71, "according to Baldwin's Survey," contained 156 83-100 acres. By actual survey it contained 162 19-100 acres. By a purchase of 50 acres off the south part of Lot 71 "according to Baldwin's Survey," the purchaser is entitled but to 50 common acres, and has no interest in the surplus.

This case was substantially as follows:

James Hubbard, in March, 1854, purchased of Wm. Watson certain land by deed. The land was described as follows: "The south part of lot 71, according to Baldwin's survey, to wit: 50 acres taken from the south side of lot No. 71, in Strongsville, the north line of said 50 acres to run across the lot, parallel with the line." It appeared in evidence that by Baldwin's survey this lot contained 156 83-100 acres, and that by a recent survey it was found to contain 162 19-100 acres. It was agreed at the time Hubbard took the deed, if the land deeded contained more than 50 acres, the purchaser was to pay at the rate of $28 per acre for such excess. It was claimed by the grantor, that the words "Baldwin's survey," qualified the contract, so that instead of taking just 50 common acres, the grantee, Hubbard, took by his deed 50 common acres and such portion of the excess aforesaid as 50 bears to 156 83-100. The parties had previously adjusted the matter between themselves upon that basis, and a note was given by Hubbard to Watson for $44.29 to cover this excess, which note was transferred after due to Carman, who recovered a judgment in the Common Pleas for the amount of the note. The defence was that there was no more than 50 acres, and the note was without consideration.

The Court, per STARKWEATHER, Judge, *held*—

1st. That the words "Baldwin's survey," only applied to the description of the lot 71, a part of which was sold to Hubbard, and that it could not have the effect of qualifying the word acre as commonly understood, so as to make it contain a larger quantity than it otherwise would.

2d. That, although there was a greater number of acres in "lot 71, according to Baldwin's survey," than the original survey called for, yet the deed to Hubbard calling for only 50 acres to be taken off from the south side of the lot, he could take only 50 common acres, and had therefere no interest in the surplus. Such being the case, the note was without consideration, and the judgment of the Common Pleas must therefore be reversed.

H. D. CLARK for plaintiff in error. C. STETSON for defendant in error.

M. A. ELDRIDGE *vs.* J. M. WOOLSEY.

[ERROR.]

In the suit, before the Code, of W. vs. E., a reference was made in the Common Pleas, and the referee was ordered to take, and state an account between the parties. E. did not assent to the reference. The referee reported an indebtedness of over $10,000 from E. to W. The Court, following the reference, rendered judgment for the amount found due by the referee. *Held*—

Such judgment is erroneous. The Court should have rendered judgment on its own finding, or the finding of a jury, and this should appear from the record.

The Court, per FOOTE, Judge, delivered the opinion as follows:

The case in the Common Pleas, in which the judgment was rendered which is now sought to be reversed, was

commenced under the old practice; $10,000 was claimed by Woolsey on a special contract, and on the common counts. A referee was appointed by the Court of Common Pleas, to take and state an account between the parties, and the referee found that there was due Woolsey from Eldridge upwards of $10,000. It no where appears that Eldridge ever consented to this reference. No exceptions were taken to this report. The only finding and the judgment in the case were as follows: "The said referee, at this term of the Court, made his report, showing a balance due from the defendant to the plaintiff on the first day of the present term of $10,515.07; and no exceptions having been taken by the defendant, and the Court being satisfied with said report, do confirm the same; therefore it is considered that the said plaintiff recover of the said defendant said sum of $10,515.07 with the costs of this suit to be taxed."

From this record, it no where appears that there was any finding by the Court or jury, and there being no inquiry by the Court or jury, but only a finding that the Master had reported a certain sum as due, and that there was no exception taken to the report, judgment was rendered for the amount so found by the Master. This is clearly erroneous. The finding should have been by the Court or jury, and the judgment should have followed this finding.

Judgment reversed.

Bolton, Kelly & Griswold for plaintiff in error. C. Stetson for defendant in error.

BANK OF ROCKVILLE *vs.* AMERICAN EXPRESS COMPANY.

[MOTION.]

Plaintiff inserted in his petition one cause of action vs. defendant as common carrier and another as warehouseman, claiming to recover only the amount of one of the causes of action. *Held*—

1. The plaintiff cannot be compelled to elect on which cause he will try the case and have the other struck out, as it does not appear they are both for the same thing.

2. If both are one cause of action in fact, whether the petition can be safely sworn to. *Query.*

The plaintiff filed his petition in this case, containing one cause of action against defendant as common carrier, and another cause of action against defendant as warehouseman, both being founded on the same cause of action. Defendant moved to compel plaintiff to elect upon which cause of action it would try the case, and to strike out the other. Judgment was asked only for the amount of one of the causes stated.

The Court, per STARKWEATHER, Judge, *held*—

That the motion must be overruled, because, although judgment was asked for the amount of only one of the causes of action, yet it did not appear from the petition that the two causes set forth were for the same claim in fact, but were stated in the petition as separate and distinct causes of action. Whether, if the two causes of action were for one and the same claim, the petition could be safely sworn to, was another question, and the person swearing to it must take the risk.

BISHOP, BACKUS & NOBLE for the motion. CROWELL against the motion.

BURLINSON *vs.* ROE.

[MOTION TO DISMISS APPEAL IN REPLEVIN.]

In Replevin, before a Justice of the Peace, where the property is appraised at over $100, the Justice has not jurisdiction to try the case, and if he proceeds to final judgment, and an appeal is taken to the Common Pleas, after judgment in the Common Pleas, the case can be appealed to the District Court, as the proceedings before the Justice after the return of the appraisal are a nullity.

This was a motion to dismiss an appeal from the Common Pleas, because the suit was originally commenced before a Justice of the Peace, then tried, and verdict and judgment rendered, and an appeal taken to the Common Pleas. The case was tried in the Common Pleas, and a verdict and final judgment rendered; and an appeal taken from the Common Pleas to the District Court. It appeared from the files of the case that the property replevied was appraised at over $100.

The Court, per RANNEY, Supreme Judge, *held*—

That the jurisdiction of the Justice over the case was terminated when the Constable made his return of the appraisal of the property, showing the value of it to be more than $100; but instead of then terminating his own proceedings, the Justice proceeded in the case to final judgment, and then on appeal certified his proceedings to the Common Pleas. The proceedings by the Justice subsequent to the Constable's return were simply void, and the case when it came into the Common Pleas stood as though no trial had been had, and the Common Pleas acquired jurisdiction of the case by the transcript of the proceedings from the Justice being filed in that Court. The fact that other matters or proceedings which

are utterly void are certified, does not affect the case, and it stands just as though nothing had been certified except what had taken place up to the time of and including the return of the Constable, showing the value of the property to be above $100.

It follows, then, that the Common Pleas only having jurisdiction of the case, and the Justice having none, after the return of the Constable, that the case is properly appealed to this Court.

Motion to dismiss the appeal denied.

CANFIELD & BEAVIS for the motion. LYNDE & CASTLE against the motion.

SMITH & CARROL *vs.* STATE OF OHIO.

[APPLICATION FOR WRIT OF ERROR.]

1. Inserting in an indictment the date of the commencement of a term at which it was found, and after it has been returned by the Grand Jury, is an immaterial amendment, and does not affect the indictment.
2. A material defect can be remedied only by a new indictment.

The error assigned in this case was that the Court of Common Pleas permitted the Prosecuting Attorney to amend the indictment by inserting the date of the commencement of the term of the Court at which the indictment was found, in the caption of the indictment.

The Court, per FITCH, Judge, *held*—

That an indictment cannot be amended in any material portion of it. If the indictment is materially defective, it can only be remedied by finding a new one.

The defect in this case was not material—the indictment may be good without a caption.

Allowance refused.

R. D. NOBLE for plaintiff in error. S. WILLIAMSON for defendant.

SEARLES & RIDER *vs.* SETH A. ABBEY, Sheriff.

[JURY TRIAL.]

Defendant having in his hands an execution against G., after having received a bond of indemnity, levied the execution on goods in plaintiffs' store as property of G., and closed the store, and held the goods for a month, and until on trial of right of property, under secs. 426, 7 and 8 of the Ohio Code, on which trial the property was found to be plaintiffs', when it was delivered up to them. *Held*—

1. Defendant was liable for the injury sustained by plaintiffs as at common law, and must make them good.

2. The rule of damages is the injury done to the property, or loss of any of it while in the Sheriff's hands, including the depreciation of it; to which amounts interest on the whole value of the property which was held by the defendant is to be added.

3. For injury to business, or salary of clerks, or store rent during the time the levy subsists, no recovery can be had against the Sheriff.

The plaintiffs in this case claimed to be the owners of some $10,000 worth of goods, and that with these they were engaged in trade in the city of Cleveland, and rented a store and employed a number of clerks, and obtained a large number of customers, and were doing a good business; and while so doing, in the year 1854, the defendant holding an execution in his hands against one Harris B. George, levied the same upon the property in question, after first having demanded and received a bond of indemnity from the plaintiff in said execution. The business of the plaintiffs was suspended in consequence of the levy for nearly a month, and during that

time they had to pay their clerks and rent. The Sheriff under the provisions of the Code, (Secs. 426 to 428,) gave notice, and had the right of property tried before a Justice of the Peace, which trial resulted in favor of the plaintiffs in this action, and the property levied upon was therefore released by the Sheriff, and returned to Searles & Rider, some of which was damaged while in the defendant's possession.

The points raised by the parties will appear in the charge to the jury.

RANNEY, Supreme Judge, charged the jury as follows :

The plaintiffs claim to be made good for the injury they have sustained, in consequence of their property having been levied upon by a process against another person, their business broken up for nearly a month, their rent and clerk hire going on at the same time, and their customers permanently lost to them, and their goods injured for want of care.

The defendant claims he acted in good faith, and having proceeded to have the right of property tried after the levy, and after the right of property was found in these plaintiffs, having surrendered the property up to them, he is not liable any further, whatever might be the case, if the plaintiffs in the execution were sued instead of him. He claims he is not liable in any event, for the suspension of the plaintiffs' business, loss of customers, rent, and clerk hire, and injury to the plaintiffs' business generally, nor to the goods while in his possession, as such injury to the goods is not claimed in the petition.

The extent of the defendant's liability depends on the construction which shall be given by the Court to the law; and

1. As to the provisions of the statute for the trial of the right of property, it is not clear what the meaning is,

except, first, when on the trial the right is found against the claimant; and second, when found for the claimant, and the Sheriff is required to sell the property after receiving, as provided in sec. 428 of the Code. In either of these cases the Sheriff is not liable for what is done, especially so in the latter case, after receiving the bond named in sec. 428.

Our Supreme Court has declared the effect of the finding against the claimant, in case of Patty vs. Mansfield, 8th Ohio Reports, page 369, by holding that he has then no claim upon the Sheriff, in case he sells the property on the execution.

Here, after the trial of the right of property resulted in the plaintiffs' favor, no bond was given, and the Code does not declare the effect in such case, and we are left to ascertain the rights of the parties by the common law.

The defendant being Sheriff, and acting by virtue of legal process, will not justify him in taking the property of one person to pay the debts of another; and he can stand in no better position than any other wrong-doer, except the fact that he acted as a public officer in what he did, goes to rebut the presumption of malice on his part.

The defendant, then, is liable to the plaintiffs as a wrong-doer, but the question arises—

2. What is the rule of damages by which this case is to be governed? And here the decisions are conflicting in different States, and this leaves us to fix our own rule, and do justice to the parties as nearly as possible; and this can only be done by making for the Sheriff a certain and uniform rule, as nearly as we can. The Sheriff has a right to know what responsibility he is incurring

to the plaintiff in an execution, and to the claimant of property which he may levy upon; his task is a difficult one, as he may be liable in case he does or does not proceed.

We think justice will be subserved by making the Sheriff liable for the property from the time he takes it till he restores it to the owner. And this rule will make him answerable as follows:

1. If the property is injured or lost while in the Sheriff 's hands, he is liable for the actual injury to or value of the goods lost.

2. If the property depreciated in the Sheriff's hands, he is liable for that depreciation; that is, for any decline in the market value of the article between the time he took it and the time he restored it. The defendant had no right to take the property from the plaintiffs' care, and he must make good any injury, or loss, or depreciation of the same while in his possession; and it is not necessary to allege this depreciation or injury in the petition, as the Sheriff was liable for the whole property by the wrongful taking, and can only give in evidence the return of the property, in mitigation of damages, and the mitigation can only be the value of the property when it is returned.

3. Plaintiffs cannot recover for injury to or suspension of their business generally, or salary of clerks, or store rent, as against the Sheriff, and it makes no difference that their business was for the time being entirely broken up, and permanently injured; a different rule might prevail as against the plaintiff in the execution.

Finally, you will ascertain the plaintiffs' claim as follows:

1st. Give interest on the whole property from the time taken till restored.

2nd. Add to this the value of any article lost.

3d. Estimate any injury to and depreciation of the property while in the defendant's hands. To the last two items add the interest from the time the property was restored to the plaintiffs.

Verdict for plaintiffs, $567.

WILLIAMSON & RIDDLE and R. P. SPALDING for plaintiffs. HERRICK and PRENTISS & NEWTON for defendant.

JASON CANFIELD, Trustee, *vs.* LATHROP, LUDDINGTON, et al.

[JURY TRIAL.]

1. An assignment, by a debtor to a trustee, for the benefit of creditors, will prevail over a prior mortgage, executed by the assignor on his stock of goods, with the understanding by *the mortgagee* and mortgagor, that the mortgagor might continue thereafter to deal with the property as his own, provided the understanding is strictly proved.

2. A chattel mortgage, if the mortgagor resided in the township of Brooklyn when it was executed, must be deposited in the clerk's office of Brooklyn township although the part of Brooklyn township in which the mortgagor resided was also in the city of Cleveland.

3. If C. knew of the mortgage when he became the assignee of the property he was not a purchaser in good faith, and it was not necessary to the validity of the mortgage that it should be deposited in any clerk's or recorder's office.

This was an action brought to recover the value of certain property, which one Wells had assigned to plaintiff for the benefit of Wells' creditors generally.

On the 15th day of July, 1854, Wells being indebted to Lathrop & Luddington in the sum of $1400, executed to them a mortgage on his stock of goods, in Brooklyn township, being in that part of the city of Cleveland west of the river. The assignment was made to Canfield on the 7th of August, 1854. Canfield took possession under

the assignment, and the defendants took forcible possession of the property while Canfield so had it in charge, and soon after the assignment, they claimed the property under the mortgage. Plaintiff claimed that the mortgage had not been duly recorded, as it was deposited in the County Recorder's office in Cleveland township and city, Wells living in that part of the city of Cleveland in Brooklyn township. Plaintiff also claimed that the mortgage was void, because there was an understanding between the mortgagor and mortgagees, when the mortgage was executed, that the mortgagor might retain possession and sell and dispose of the property mortgaged, for his own benefit, although there was no such provision in the mortgage.

The Court, per STARKWEATHER, Judge, charged the jury substantially —

That the question was, which party had the right to this property; that the plaintiff's claim was by virtue of an assignment for the benefit of all the creditors of Wells; and the defendant, by virtue of his chattel mortgage; that whichever party showed the prior right must succeed.

The mortgage being earlier than the assignment, that must prevail, if valid; that it was good on its face, but that plaintiff sought to impeach it — 1st, because not properly recorded; 2nd, because accompanied by an agreement when it was made, that the mortgagor might remain in possession of the property, and sell the property for his own benefit, the same after the mortgage was made as before.

That as to the recording the mortgage, if the mortgagor resided in the township of Brooklyn when the mort-

gage was executed, then it was not properly recorded; for the Recorder's office is in the *township of Cleveland*, and it makes no difference that the portion of Brooklyn in which Wells resided was a part of the city of Cleveland.

But the recording of the mortgage in the wrong office will not render the mortgage void, if the plaintiff knew when the transfer was made to him that such mortgage existed; for if he did he could not be a purchaser in good faith; nor was he a creditor of Wells. If then Canfield had notice of the mortgage, he was not a purchaser so as to protect him against the mortgage, provided the mortgage is good in other respects.

But if, as plaintiff claimed, there was an agreement between Wells and the mortgagees, that he might sell and dispose of the property for his own use, after the mortgage was made, the same as before, and he remained in possession and control of it at the same time, then the mortgage was void. There must have been an understanding that this should be the state of things, not by Wells only, but the mortgagees must have had this understanding as well as Wells. If the plaintiff fail in proving this, the mortgage was valid against the plaintiff, if he had notice of it when he took the assignment.

The jury rendered a verdict for plaintiff, for $2620.40.

Defendants moved for a new trial, because the verdict was against the law, as given to them by the Court; that it was contrary to evidence, and the damages were excessive.

On the hearing on the motion, RANNEY, Supreme Judge, delivered the opinion of the Court, holding—

That the case showed the mortgage to have been given for an honest debt; that the charge was that the

mortgage was not properly recorded, but that if Canfield knew of the mortgage to Lathrop & Luddington when he took the assignment, then it was not necessary that the mortgage should have been recorded in order to make it good, if it was valid otherwise; that the proof was clear that Canfield knew of this mortgage.

That on the point "that if the goods were left with Wells, to be dealt with for his own benefit, after the mortgage, by an understanding between the parties thereto, not contained in the deed, the mortgage would be void in law"—the Court said that as this was going a step further than the Supreme Court had gone, though it had been held so frequently by District Courts, the party setting up *this understanding* to avoid the mortgage must be held to strict proof. That proof was wanting here; and for both of these reasons a new trial must be granted.

Griswold & Loomis for plaintiff. C. Stetson for defendants.

JOHN M. ARMSTRONG, Receiver of the Canal Bank of Cleveland,

vs.

JOHN C. GRANNIS in the case of an attachment in favor of the State of Ohio vs. said Bank.

[TRIAL BY JURY.]

1. An assignment by an Independent Bank, incorporated under the General Banking Law of Ohio, passed February 24, 1845, providing for the payment, 1st, of the circulating notes of the Bank, 2nd, for the payment of the other indebtedness ratably, 3d, for payment of the surplus, if any, to the stockholders, is not void, although made in the view of *general* insolvency, provided it is not made in contemplation of suspending specie payments on its circulating notes.

2. If such assignment is made for the purpose of preventing the assets of the Bank from going into the hands of a receiver, to be appointed by the State officers, in case it should suspend specie payments, and to keep them under the control of persons of its own selection, the assignment is a fraud on the law under which the Bank is chartered, and is void.

3. If the object of the assignment be to defraud creditors, or if the *principal* object of the assignment be to hinder and delay creditors, it is void. But if the object in view in making the assignment be lawful, although made with the intent to delay creditors so far as may be necessary to secure the object in view, the assignment is valid.

4. A transfer by the assignees to the receiver appointed by the State officers, after *the act* of insolvency contemplated by the statute is committed, of all the assets coming to them by the assignment, vests in the receiver all interest and rights which the assignees took by the assignment.

This suit was brought by the plaintiff in his official capacity of receiver, claiming certain property which was attached by the Sheriff of Cuyahoga county, on the 13th day of November, 1854, in the case of the State of Ohio, commenced and prosecuted at the instance of H. A. Ackley vs. the Canal Bank of Cleveland. Defendant admitted the appointment of plaintiff as receiver on the 29th day of November, 1854, but claimed that the title of defendant related back to the date of the attachment, which was prior in time to the appointment of the

plaintiff as receiver of the Bank. Plaintiff admitted the fact of the attachment being prior to the plaintiff's appointment as receiver, but offered in evidence —

1st. An assignment by the Canal Bank, dated November 9th, 1854, properly executed, purporting to be a transfer of all the effects of the Bank to W. J. Gordon, I .L. Hewitt, and W. H. Huntington.

2d. A release and transfer by said Huntington of all interest, legal and equitable, in the assets of the bank derived by said assignment, to E. F. Gaylord, November 13th, 1854.

3d. An assignment by said Gordon, Gaylord and Hewitt, of all the assets assigned to them by the instruments aforesaid, dated December 12th, 1854, to the plaintiff as receiver.

4th. A further assignment, dated Dec. 14th, 1854, covering the same assets as those in the one last named, and more especially such as were claimed by the plaintiff in this action.

The execution of these several transfers being severally proved, the plaintiff's attorneys offered the same as evidence to the jury; but their reception was objected to by by defendant's attorneys, who claimed that the plaintiff could not derive title through the first or of the subsequent ones, which were dependent on the first —

1st. Because the Canal Bank was an independent banking institution, and by the law of February 24th, 1845, under which this bank existed, the bill-holder was amply secured by a deposit of stocks of the State of Ohio, or the United States, with the Treasurer of State; and the assignment by the bank purported to

make a provision in the first place for the bill-holder in preference to other creditors.

2d. Because by sec. 41 the law had prescribed how a receiver of an insolvent bank should be appointed, that the Legislature had devolved this duty upon the Secretary, Treasurer and Auditor of State, and that this assignment by the bank was a fraud on that law and void—that it was a contrivance to appoint its own assignees to evade the statute.

3d. The release to Gaylord by Huntington was objected to because Huntington could not divest himself of the trust, and Gaylord could not take it in this manner; it must be by order of Court, &c.

4th. That the conveyances by the assignees to the plaintiff could not convey anything to him as receiver.

Plaintiff's attorneys maintained that the assignment was not in fraud of the statute, but in pursuance of it; that although it was in contemplation of insolvency, as applied to individuals, yet it was not in contemplation of *the* insolvency named in the statute, which was a failure to redeem its circulating notes in specie.

The Court, Foote, Judge, presiding, overruled the defendant's objections, for reasons appearing in the charge to the jury.

The plaintiff then offered testimony, showing that at the time of the assignment by the bank, the whole possession and control of its assets were transferred to the assignees, and that subsequently they, and at the time of their assignment to the plaintiff, transferred to him the same assets.

The defendant's attorneys then offered testimony for the purpose of impeaching the assignment by the bank, for various reasons; and the plaintiff offered testimony for the purpose of sustaining it—all which will appear in the charge of the Court.

The defendant's attorneys interposed other objections to a recovery by the plaintiff, which will also appear in the charge.

FOOTE, Judge, charged the jury as follows:

This action is brought to determine the right of possession of the property in question, which was and perhaps still is the property of the Canal Bank. There is no question but that on the 9th day of November, 1854, the property in controversy belonged to the bank; nor that on that day an assignment was made to trustees, who accepted the trust; nor that one of these trustees released to E. F. Gaylord, who also accepted the trust and entered upon its performance. The assignment provided for the application of the assets of the bank, after the same should be converted into money, in the first place to the payment of the circulating notes of the Bank, and then to the payment of the other indebtedness of the bank ratably, and the surplus, if any, to be paid to the stockholders of the bank.

There is no controversy that afterwards, and on the 13th day of November, the property in question was attached by the Sheriff, in the action of the State of Ohio against the bank; that the defendant was appointed receiver of the property so attached.

It is not controverted that on the 29th day of November, 1854, the plaintiff was duly appointed receiver of

the bank, it having committed the act of insolvency contemplated by the statute, after the assignment of the 9th of November had been made.

After the plaintiff's appointment of receiver, the trustees under the assignment by the bank, conveyed to the plaintiff as such receiver, who caused himself to be made a party defendant in said action of the State of Ohio against said bank, and a judgment was rendered against said bank in said action, at a term of the Court of Common Pleas, 1855.

The defendant claims that the judgment in favor of the State of Ohio against the bank is a bar to the claim set up by the plaintiff in the suit; that judgment determined conclusively the amount of the bank's indebtedness to the State of Ohio, and the receiver of the bank as well as the bank itself, is bound by it; but that judgment determined nothing as to the right of the plaintiff as receiver to the possession of the property in question, and cannot operate to prevent him from recovering in the action.

The defendant further claims that the plaintiff cannot recover for the reason that the assignment by the bank to trustees is void on its face. We cannot say that this assignment is void on its face, and the conveyances to the plaintiff are sufficient to vest in him, in his official capacity, all that the assignees of the bank took, by the assignment to them, and if there is nothing else in the case to prevent it, the plaintiff must recover. If the plaintiff has no rights by virtue of these transfers, then clearly he cannot succeed, as the attachment under which the defendant claims is prior to the appointment of the plaintiff as receiver, and we are brought to this question: Whether the conveyance by the bank to trustees on the

9th of November, 1854, for the benefit of creditors, is, by reason of anything not apparent on its face, void as against the creditors of the bank.

It is claimed by the defendant, that the circumstances under which it was made, and the object of the assignment, render it utterly void.

It is said: It was made in contemplation of committing an act of insolvency, and, therefore, a fraud upon the statute and an evasion of its provisions.

The 41st section of the General Banking Law of Feb. 24th, 1845, and under which the Canal Bank existed, provides that, when it shall be made to appear to the Treasurer, Secretary, and Auditor of State, or a majority of them, that an independent banking company has committed an act of insolvency by refusing to redeem its circulating notes, on demand, in gold or silver, during banking hours, then said Treasurer, Secretary and Auditor, or a majority of them, shall appoint a receiver of the effects of such bank.

And we instruct you upon this point, that if the assignment by the bank was made in contemplation of the commission of an act of insolvency, it is void. Or if the bank, without any positive intention at the time to commit an act of insolvency, regarded it as something which must necessarily or would probably happen, and made the assignment with the intent, in case it should happen, to prevent its assets from going into the hands of a receiver to be appointed by the State officers, and to keep them under the control of persons of its own selection, the assignment is a fraud upon the law, and is void. But, the act of insolvency contemplated, in order to produce this effect, must be *the act* mentioned in the statute, that is, a refusal on the part of the bank to redeem its circulatiag notes, as

required by the statute. And if the directors and officers of the bank, at the time of the assignment, regarded the bank as in an insolvent condition, but did not contemplate the commission of an act of insolvency by suspending specie payments, as necessarily or probably to happen, then there is nothing in this objection to invalidate the assignment.

The defendant further insists that the assignment was made with the intent to hinder and delay the creditors of the bank, and is for that reason void.

We have a statute which provides that all conveyances made with the intent to defraud creditors shall be void. To bring a case within the provisions of this statute, it is not necessary that there should be an intention to cheat any creditor out of his debt or any portion of it. It is sufficient if the principal object and purpose of the parties to the conveyance be to hinder and delay the creditors of the grantor in the collection of their debts. An intention to *delay* creditors is not the same thing as an intention to *defraud* creditors. A conveyance made with intent to *defraud* creditors, is absolutely and unqualifiedly void. And a conveyance made with intent to *delay* creditors is also void, provided the principal inducement to the making of the conveyance be to delay creditors. But if the principal motive to the conveyance be the accomplishment of some other object, in itself lawful and proper, as to pay off one creditor in preference to another, or to make an equitable distribution of property among all the creditors of the grantor, the conveyance is valid, although made with the intent to delay creditors so far as may be necessary to secure the object in view. In such a case the delay to creditors is incidental to the conveyance, and follows as a necessary consequence from

the exercise by the parties of their right to effect the principal object of it. The Canal Bank of Cleveland, so long as it did not contemplate the commission of an *act of insolvency*, had a right to convey its property to one creditor in preference to another in payment of a debt, and to convey its property to trustees in trust for the payment of its debts, and the delay to creditors incident thereto or resulting necessarily therefrom, whether intended or not, would not affect the validity of the conveyance.

If, then, the assignment in question was made by the bank in good faith, for the purposes expressed on its face, with no intent further to delay creditors than would be necessary in carrying out its provisions in a proper manner, it is not void, as being made with intent to delay creditors. But if it was made as a mere temporary arrangement, to be carried into effect or not, as the bank should direct, or if the principal object of making it was to delay or embarrass the creditors of the bank as a means of obtaining terms from them which would enable the bank to continue its business, or of making sale of its charter, or in any other way of benefitting the bank, and the bank did not in fact under and pursuant to the assignment make an absolute and unqualified surrender of the property embraced in it for the purposes therein expressed, without reservation, condition or limitation, then the assignment is void.

Verdict for plaintiff.

S. J. Andrews and Mason & Estep for plaintiff. Spalding & Parsons, J. Adams, and S. B. Prentiss, for defendant.

UNITED STATES CIRCUIT COURT,

FOR THE

NORTHERN DISTRICT OF OHIO,

JULY TERM, 1856.

BEFORE HON. JOHN M'LEAN, OF THE SUPREME COURT, AND HON. H. V. WILLSON, OF THE DISTRICT COURT.

WILLIAM S. WICKHAM & WILLIAM S. GOSHAM,

vs.

MOSES DILLON.

1. A judgment obtained in the absence of defendant and his counsel, when the counsel was prevented from attending the trial by sickness, will be set aside on motion, and a new trial granted.

2. An assignment made by G., a citizen of Virginia, of personal property situated in Ohio, to assignees, for the benefit of G.'s creditors, the assignees also being citizens of Virginia, is a contract made in and to be governed by the laws of Virginia.

3. When such assignment stipulates—1st, for the payment of the expenses of the execution of the trust—2d, for the distribution of the proceeds to such creditors as within six months shall come in and assent to the terms of the assignment, by subscribing a release of the assignor from any claim for any balance remaining due such creditors after receiving their dividend under the assignment—3d, for excluding from benefit under the assignment any creditor who may issue legal process either against the goods or body of the assignor—4th, that the residue shall be distributed among such creditors as shall not within six months release the assignor from all liability—5th, that the surplus, if any, be paid to the assignor—it is valid by the laws of Virginia, and will be sustained in this State, when the transaction is not fraudulent in fact.

4. Placing property in the hands of trustees for the benefit of creditors, negatives the idea of fraud.

OPINION OF JUDGE WILLSON.

This is a motion to set aside the judgment obtained by the plaintiffs at the July Term, 1855, and for a new trial.

Two causes are assigned in support of it. The first is, that the case was tried in the absence of the defendant and his counsel, and that said counsel were unavoidably absent through sickness. Second, that the verdict is against the evidence.

The Court would grant this motion without hesitation on the first cause assigned. But as all the evidence in the case is in writing, we are asked by counsel on both sides, to review it, and grant or overrule the motion as the law and the testimony shall appear in the examination of the case on its merits.

The action is in trover, brought by the plaintiffs, (as assignees and trustees of Marx Graff, of Virginia,) to recover the value of twenty boxes of dry goods. The defendant claims to hold these goods as Sheriff, by virtue of a writ of foreign attachment, issued by the Court of Common Pleas of Jefferson county, Ohio, against Marx Graff, at the suit of Martin Lewis & Co.

From the evidence on file, it appears that in the summer of 1851, Marx Graff, a resident merchant of Wheeling, had become largely indebted to eastern creditors for goods and merchandise. Of these goods, on their arrival at Wheeling, (and before being unpacked,) in August, 1851, he sold to Raphael Myerson twenty-seven boxes, for $8,000, and took his note for the amount. Myerson shipped the goods from Wheeling to Steubenville, in the State of Ohio, and on the 2d of September placed them in store with Alexander Doyle, and took from him a warehouse receipt for the same. The goods remained in Doyle's warehouse until the 19th of November, at which time the plaintiff Wickham took possession of them by virtue of said warehouse receipt, and a written order of that date from Myerson to Doyle, for the deliv-

ery of the property to the plaintiffs. This order and the warehouse receipt were taken by the plaintiffs, as assignees of Graff, in discharge of Myerson's note of $8,000.

On the 21st of November, while the plaintiffs were in the act of transhipping these goods at Steubenville, the defendant Dillon, acting as Sheriff of Jefferson county, seized and took into his own possession twenty of said boxes of goods, under and by virtue of the attachment process of Martin Lewis & Co. aforesaid.

The plaintiffs claim title to the goods in question from Graff, who, on the 19th of November, 1851, executed and delivered to them at Wheeling in the State of Virginia, a deed of trust of all his property for the benefit of his creditors, without any reservation whatever in restriction of title. The trust deed was duly acknowledged and recorded on the day of its execution and delivery, and the conveyance in all respects as to form was made in accordance with the laws of Virginia.

This deed of trust provides, that the trustees shall sell the property as may seem proper in their discretion, on credit or for cash. They shall first pay the costs which accrue in the execution of the trust. "They shall disburse the residue in payment and satisfaction, *pro rata*, of all other just debts due or to become due from the said Marx Graff to any creditor or creditors, who shall, within six months from the date of this deed, assent to the terms thereof by subscribing a release to be appended thereto, whereby the said creditor or creditors shall, in consideration of his or their claim or debt coming in for participation of the said balance *pro rata*, discharge and forever release and acquit the said Marx

Graff and his representatives from all responsibility for any portion, if any, of such debt, claim or demand as remains unpaid in the *pro rata* distribution of said balance, —excepting, however, expressly from all benefit under the operation of this deed, any creditor or creditors who may within that period issue any legal process against the goods of the said Marx Graff, or against his person; and the residue of said fund, if any remain, shall be divided *pro rata* among those creditors who shall fail and refuse to come in and within said six months execute and deliver such release; and the residue, if any, they shall pay over to the said Marx Graff or his assignees."

At the time of these transactions, the plaintiffs, Myerson and Graff, were all citizens and residents of Virginia, and the sales and paper transfer of title to the property named, were made in the city of Wheeling.

Upon this statement of facts, three questions of law are presented for our consideration.

1st. Is this deed of trust, in construction and effect, to be governed by the laws of Virginia, where it was made and where the parties to it resided, or is it to be governed by the laws of Ohio, where the property is found?

2d. If the former, is the deed then valid and effectual in Virginia for the legal transfer of the property?

3d. Is there such evidence of fraud on the face of the transaction, that will make the transfer void, as to creditors?

It is a principle of international law that courts shall take notice of and give effect to the title of *foreign assignees* of an insolvent debtor, whether the insolvent made the transfer himself, or the law of the State of his

domicil made it for him; and it is for this reason, that the succession to and distribution of personal property is regulated by the law of the owner's domicil and not by the *lex loci rei Sitae.* This rule is founded, as well in the necessity to secure justice by avoiding conflicts of jurisdiction in matters affecting title, as to promote comity among States and nations.

In the case of Phillips vs. Hunter (2 H. Blac. R. 402) this question came before all the judges of the Exchequer Chamber on error from the King's Bench. That high court fully sustained the principle as laid down by Lord Camden in Joliett vs. Deponthieu, decided in 1769, and adopted, as sound law in England, the decision of Lord Kenyon in Hunter vs. Potts (4 Term R. 182.) This last case established the great doctrine, that the title of the foreign assignee of an insolvent debtor's estate, under the law of the bankrupt's domicil, was to be preferred to the subsequent attachment of the domestic creditor, made (in that case) in America under the law of Rhode Island. And it has been decided over and over again by the English courts, that a failing debtor, before the actual issuing of the commission of bankruptcy, might assign his property *abroad* as absolutely as if it had been in his own tangible possession; and that such assignee was entitled, by operation of law, to deal as he might have done with his property.

The *lex domicilii,* in respect to personal property, has been adopted by the highest judicial tribunals in the United States, and in so doing our courts have broadly declared, that in the general disposition by the owner of personal property in one country, it will effect it everywhere, because in regard to the owner's control

over it, *personal property has no locality*. The application of this principle impairs no right, but promotes general justice, and is founded on the mutual respect, comity and convenience of commercial States and communities. Bank U. S. vs. Donnally, 8 Peters R. 371 ; 4 John. Ch'y R., 460 ; 8 Paige R., 446–519.

The *status* or capacity of Graff, therefore, to make the deed, and the construction and effect of the deed itself, depend on the laws of Virginia. What, then, is the legal effect of this deed in Virginia ?

It is urged that the deed is *void*, because it is made to prefer creditors.

By the 6th Section of the ordinance of convention, the State of Virginia adopted the common law of England, and the acts of Parliament of a general nature in aid thereof, prior to the 4th year of the reign of James the First. That ordinance, which was adopted in 1776, is still in force, except in such modifications as have been made by the Legislature of the State. It is not pretended, however, that any such modification has been made, affecting the right of a failing debtor to so dispose of his property, as to make a preference in the payment of his creditors. The common law of England declares that " it is neither immoral or illegal to prefer one set of creditors to another." In Num. vs. Wilsmore, 8 T. R. 528, Lord Kenyon says, " putting the bankrupt laws out of the case, a debtor may assign *all of his effects* for the benefit of *particular* creditors." And in the case of Small vs. Audley, 2 P. Wms. 427, where an assignment was made to a favored creditor, to secure money lent by him to a merchant only the day previous to the commission of the act of bankruptcy, the Court,

in deciding the case, said, "There may be just reasons for a sinking trader to give a preference to one creditor before another—to one that has been a faithful friend, and for a just debt lent him in extremity, when the rest of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers; whereas the other may be not only a just debt, but all that such creditor has in the world to subsist on; in such case the trader honestly may, nay ought, to give the preference." In language equally strong, the same principle was maintained by the Court in Cook vs. Goodfellow, 10 Mod. R. 489, and so of numerous other English cases.

Under the ordinance of 1776, the highest judicial tribunal of Virginia has adopted the decisions of the English common law courts on this question.

Mr. Justice Carr, in giving the opinion of the Court of Appeals in McCullough et al, vs. Somerville, 8 Leigh's R. 427, says, "it is unquestionable that a debtor in failing circumstances may prefer one creditor or one set of creditors to another; nor is his right to do so at all weakened or impugned by the maxim that equality is equity. This maxim is justly a favorite one in the courts of equity in cases to which it applies; but cannot be permitted to interfere with the right which a debtor has to secure this or that creditor or class of creditors in preference to others."

I know this doctrine is repugnant to the legislative policy of the State of Ohio. But it is the law of the domicil of the parties where the deed was made, and that law obtains in giving effect to the deed, and in transferring the legal title to the property, unless there is something else in the transaction which renders it fraud-

ulent in contemplation of law; and this brings us to the only remaining question in the case: Is there such evidence of fraud in the transaction or on the face of the deed, that will make the transfer void, as to creditors?

The original sale of the goods by Graff to Myerson, would doubtless have been declared fraudulent, had the goods, while in the hands of Myerson, been seized under legal process against Graff by his creditors. The circumstances of that sale had all the indicia of an intent to defraud creditors. The facts that the goods were purchased by Myerson without examination—and without being unpacked from the original boxes and sent hastily out of the State, would be sufficient to raise a legal presumption of fraud in a contest between Myerson and an attaching creditor of Graff. But the assignment to the plaintiffs by Graff of all his property for the benefit of his creditors, on the 19th of November, and the subsequent canceling of the $8,000 note, and the receipt of the goods therefor by the assignees, placed the whole matter upon a footing as if no sale had been made to Myerson at all. The goods and property being placed in the hands of trustees to pay creditors, negatives any presumption of intent to defraud creditors. If the deed is valid and effectual for the purposes intended by it, then the title to the goods was perfected in the plaintiffs, and they were not thereafter subject to legal process against the assignor.

But it is said this deed has the evidence of fraud on the face of it, inasmuch as it demands a general release of the whole debt of each of the creditors, upon the payment of a part.

If Graff gave up all his property, and in doing so had a right to pay one in exclusion of others, with what pro-

priety can he be charged with fraud, because he preferred those who should relinquish all claim upon his future earnings? To set aside this deed as fraudulent, because in its provisions those creditors are preferred who accept its terms, is really to deny the right to prefer at all; and this right, we have seen, is clearly established in Virginia. Where the failing debtor has assigned all of his property for the benefit of his creditors, and where there is no concealment, it is in accordance with the current authority of all the English cases, that such compromises are just and lawful. (Jackson vs. Lomas, 4 Term R. 166.) So in Brasher vs. West et al., 7 Peters, 615. Chief Justice Marshall in deciding the case, says: "Humanity and policy plead so strongly in favor of leaving the product of his future labor to the debtor who has surrendered all his property, that in every commercial country, except our own, the principle is established by law; and this furnishes a very imposing argument against its being a fraud." The authority of this last case was fully recognized by the Virginia Court of Appeals in Skipwith's Exr's vs. Cunningham, 8 Leigh, 271, when the court unhesitatingly sustained a deed nearly similar in all of its provisions to the one now drawn in question before this Court. There the deed was made by Richard M. Cunningham to Brodnax and Osborn, by which Cunningham, a failing debtor, conveyed all of his property (excepting notes to the amount of $300, which he retained to pay honorary debts,) in trust for the benefit of his creditors. By the terms of the deed, the trustees were in their discretion to sell the property for cash, or on credit, and out of the proceeds to pay first the expenses of the trust, and then to pay and satisfy all the claims specifically enumerated, as

debts of superior honorary obligation, and disburse the residue in the payment *pro rata* of all the just debts due from said Cunningham to any other creditor or creditors who should, within four months after the date of the deed, assent to the terms thereof, by subscribing a release to be appended thereto, whereby the said creditor or creditors should in consideration of his or their claim or debt coming in for participation of the said balance, *pro rata*, discharge and forever acquit the said Cunningham, his heirs and administrators, from all responsibility for any portion (if any) of such debt or claim as might remain unpaid in the *pro rata* distribution of the said balance—excepting, however, from all benefit under the operation of the deed, any creditor or creditors, who might within that period issue any writ of *capias ad satisfaciendum* against the body, or writ of *fieri facias* against the goods, or other process of execution against the lands of said Cunningham, &c.

The deed of Cunningham was sustained in every particular by the Virginia Court of Appeals.

It is not a little singular, but so it is, that the deed from Graff to his trustees, in *purpose and terms*, is almost in *haec verba*, with that of Cunningham to his trustees. Hence the facts in the case before us are substantially *res adjudicatae.*

We therefore hold that the legal title of all Graff's property became vested in the plaintiffs by virtue of the deed which is in evidence, and that such title was a barrier against any process at law against the property.

The motion for a new trial is overruled.

D. Peck for plaintiffs. Stanton & McCook for defendants.

CASES DECIDED

IN THE

CUYAHOGA COMMON PLEAS,

FEBRUARY TERM, 1856.

CLEVELAND & MAHONING RAIL ROAD COMPANY,

vs.

JOHNSON & PERKINS.

[ERROR.]

The Probate Court has *jurisdiction* to settle the rights of parties to money paid into said Court, in cases where proceedings have been had in the Probate Court for the appropriation of lands by a Rail Road Company.

This was a case originally instituted in the Probate Court, for the purpose of appropriating lands. The lands were appropriated, the damages were assessed by a jury, and the money paid into the Probate Court of said county. It appeared that Jacob Perkins, a defendant, claimed an equitable interest in some of the land appropriated, and he filed a motion in the Probate Court to have the portion to which he claimed himself as equitably entitled, awarded to him. It was claimed by Johnson, the other defendant, that the Probate Court had no jurisdiction to settle the interests of the parties to this fund, and asked the Court to dismiss the motion of Per-

kins for want of jurisdiction, which the Probate Court did. The counsel of Perkins therefore excepted, and by petition in error brought the proceedings into this Court to reverse the proceedings of the Probate Court in dismissing the motion of Perkins.

On the hearing in the Common Pleas, FOOTE, Judge, *held*—

That if the Probate Court had no jurisdiction to settle the rights of these parties and distribute this money, then the Probate Judge must become a party litigant to a proceeding in this Court for the distribution. That the Legislature did not so intend when the law was passed; but it was intended in this, as in other cases where money is paid into Court, that the Court into which money was paid should have the final disposition of it; that it will not be going too far in saying that the Court having jurisdiction of the matter of ascertaining by jury the damages to be awarded for the appropriation of the land, and of receiving the amount of such damages, shall like other Courts have full control over the money paid into it in such cases. It therefore follows that the Probate Court had jurisdiction to settle the rights of the parties to the fund in question, and to distribute the fund according to its finding. The judgment of the Probate Court that it had not such jurisdiction, is therefore reversed.

BACKUS & NOBLE for Perkins. BOLTON, KELLY & GRISWOLD for Johnson.

ABNER STONE *vs.* ERASTUS SMITH.

[PROCEEDINGS IN AID OF EXECUTION.]

Under section 459 of the Code, in a proceeding in aid of execution, nothing further can be done than examine the judgment debtor. No further order can be made when it appears a third person has a claim on the property sought to be subjected; his right can only be affected by a trial by a court or jury in the ordinary way.

The plaintiff asked an order on defendant, to pay into Court, or into the hands of a receiver, a certain claim which he held in his possession, to be collected, and the proceeds applied on the plaintiff's judgment against defendant.

This was a proceeding under sec. 459, and no one was made party but said Smith. It appeared by examination of the defendant, that he was indebted to some person, and to secure him he had appropriated the claim sought to be subjected to secure such indebtedness, but that this appropriation was without the knowledge of the one to whom he was indebted.

STARKWEATHER, Judge, *held*—

1. That a proceeding under sec. 459, could go no further than the examination of the judgment debtor; that no order could then be made, and when the examination was concluded the object of the section was accomplished and the proceeding must be dismissed; that the object was a disclosure as to his property, all of which had been obtained.

2. That it appearing from the examination of Smith, that some other person had, or might have an interest in the claim sought to be subjected, this Court would

not in this summary manner pass upon the rights of the parties, but another proceeding must be instituted to settle such right.

That the party claiming property had a right to his day in court and to a trial by jury.

Motion of plaintiff denied. Proceedings dismissed.

FARMERS' BANK OF RIPLEY *vs.* H. D. WILLIAMS.

1. The discount of a draft drawn in Ohio on a bank in New York city, "acceptance waived," having ninety-five days to run, and discounted by a branch of the State Bank of Ohio, is not usurious because the branch bank reserved interest at the rate of 6 per cent. per annum, without allowing for the difference in sight exchange (which was ¾ per cent.) between the place where discounted and the city of New York, without it is made to appear that this species of paper discounted is worth more than par.

2. Such transaction must be governed by the 61st section of the law of Ohio, passed February 24, 1845, to incorporate the State Bank, &c., and not by sec. 4 of the act of 1850, (Swan's Statutes, 1854, page 106.)

3. If at the time of the discount the draft was worth more than par, it would tend strongly to show the transaction usurious.

FOOTE, Judge, delivered the opinion:—

This was a suit on a draft drawn by the Canal Bank of Cleveland, to the order of defendant, and by him indorsed, for $2,500, on the Continental Bank, New York, "acceptance waived," dated August 15, 1854, and having ninety-five days to run. Plaintiff discounted this draft, reserving interest at the rate of 6 per cent. per annum, and allowing nothing for the difference in exchange between Ripley, Ohio, and New York City, which was on sight drafts three-fourths of one per cent. at the time the discount was made, and one per cent. and over when the draft matured.

Defendant claims that he is exonerated from the payment of this draft, because no allowance was made in the discount for the exchange or premium, which, added to the interest deducted by the bank on the discount of the draft, will make the transaction usurious under the 61st section of the act passed February 24, 1845, for the "incorporation of the State Bank of Ohio," &c., under which act the plaintiff was organized. This 61st section prohibits the taking of more than at the rate of six per cent. per annnm in the discount of paper. It then provides as follows: "But the purchase, discount or sale of a bill of exchange payable at another place than the place of such purchase, discount or sale, at the current discount or premium, shall not be considered as a taking, reserving or receiving interest, provided no agreement or understanding shall be made that the same shall be paid at any other place than that at which it is made payable."

Plaintiff says it was authorized to take interest as it did, without allowing for this premium, by the 4th section of "An act to restrain banks from taking usury," passed March 19, 1850, (Swan's Statutes, 1854, p. 106.) Also because this draft was not worth more than par. This 4th section restrains the bank from receiving or reserving any sum as interest on any paper payable out of this State, greater when added to the current rate of exchange or premium in such paper will make the sum received as discount or interest than at the rate of twelve per cent. per annum.

This is not an enabling act, but is merely restraining, and does not conflict with any other positive provision of this or other acts in relation to the subject of taking usu-

ry by banks, and we must look to other provisions, and see what rights are conferred by them.

By the 61st section above referred to, it will be seen if more than the prescribed rate of interest is received, it works a forfeiture of the whole debt.

By the act of February 24, 1848, (Swan's Statutes, 1854, page 104, sec. 4,) this forfeiture could be established only by an action in the name of the person or persons from whom the illegal interest had been received, and the amount when recovered was to go to the use of common schools.

This last provision has been repealed by the 1st section of the act of 1850 aforesaid, and by such repeal the said 61st section has been reinstated, and stands precisely as it did originally.

This has been so held in case of the Preble County Bank vs. Russell et al., (Ohio State Reports, 313.)

This case, then, is to be governed by the 61st section of the law "incorporating the State Bank of Ohio," &c.

The question then is—*Has by that section usury been taken in this case?*

To solve this question, it will be necessary to answer another. Is the discounting of this kind of paper without allowing the premium of 3-4 per cent., which was the premium at Ripley on sight exchange on New York at the date of this discount, usurious?

There would be but little difficulty to find that usury had been taken if this was an ordinary thirty day draft on New York, and the premium was 1 per cent. on it, and it had been discounted and interest reserved at the rate of 6 per cent. per annum, and no allowance made for the premium. But this is not that kind of paper. It is

payable 95 days after its date, "acceptance waived," and it should be shown that this kind of paper had a market value above par when and where it was discounted. This has not been shown here. It not so appearing, the plaintiff is entitled to recover. If it were proved that this paper was above par where it was discounted, it would tend strongly to show that the bank meant to take more than six per cent. interest in discounting it. No such proof, however, appears.

Judgment for plaintiff.

PRENTISS, PRENTISS & NEWTON, for plaintiff.
BISHOP, BACKUS & NOBLE, for defendant.

Notes of Cases Decided in the Supreme Court of Ohio,

APRIL TERM, 1856,

NOT IN 4 OHIO STATE REPORTS.

CHARLES BUTLER et al *vs.* HENRY B. CURTIS et al. Bill of Review, from Lucas county.

J. R. SWAN, J., delivered the opinion of the Court. *Held*—

That the vendee of a judgment debtor, who has not paid the purchase money, but has received a conveyance from the judgment debtor, cannot sustain a bill to quiet his title as against a purchaser of the land under a judgment rendered after the contract of sale, unless he has paid or brings into Court the purchase money.

BARTLEY, J., dissented.

JOHN DOE *ex dem.* ATEN *vs.* DANIEL STEWART. Error, from Athens county.

J. R. SWAN, J., *held*—

That a description upon a duplicate, and a sale for taxes of a tract of land as one hundred and fifteen acres, part of sec. 36, N.

W. corner, is defective, unless the one hundred and fifteen acres were situate in the N. W. corner of the section, and in a square form.

Judgment below affirmed.

THE STATE OF OHIO, on the relation of the Prosecuting Attorney of Sandusky county, *vs.* RALPH P. BUCKLAND, EBENEZER LANE, and others. Information.

BARTLEY, J., *held*—

1. That a Judge of the Common Pleas has the authority in the exercise of chamber powers as a member of the District Court of any county of the proper district, to grant leave to file an Information in the nature of a quo warranto, in the District Court.

2. That the authority of the Prosecuting Attorney of any county to file an Information in the nature of a quo warranto, given by the statute relating to informations in the nature of quo warranto, passed March 17, 1838, is not repealed or superseded by any provision of the act prescribing the duties of the Attorney General, passed May 1, 1852.

3. That where such Information charges the defendants as an association of persons, with usurping or illegally exercising a franchise, and assuming to act as a corporation, without sufficient authority of law, for the fraudulent purpose of enabling another or a legally constituted corporation to evade an injunction of the Supreme Court restraining it from doing an act unwarranted by law and in violation of its corporate powers, the District Court may have jurisdiction of the case, if it appear that the principal office of the association, or the office of the president thereof, be within the county.

Motion to quash the Information overruled, and cause remanded.

NOTE BY THE EDITOR. — It will be observed that this number contains a great variety of cases, and those applicable to the every day business of life. It has been my object especially to select such cases for publication. If my time were not so occupied as to preclude me from it, I should enter at once upon the publication of this work monthly, as I have matter enough on hand for several numbers in advance. My public duties and my private affairs, however, will not permit me to enter into the business of publishing and circulating a work of this description. Another number may be expected in a short time; but the subsequent numbers will be issued at irregular periods.

J. P. BISHOP.

CLEVELAND, FEBRUARY, 1857.